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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The Federal Communications Commission is empowered to enforce 18 U.S.C. 1464, which prohibits broadcasts of indecent material. In a statute enacted in 1988, Pub. L. No. 100-459, § 608, 102 Stat. 2228, Congress directed the FCC to enforce Section 1464 on a 24-hour-per-day basis. The FCC has promulgated a regulation, 47 C.F.R. 73.3999, providing for such enforcement. The question presented is whether the 1988 statute and the FCC regulation are unconstitutional, on their face, under the First Amendment.

PARTIES TO THE PROCEEDING

The petitioners, respondents below, are the Federal Communications Commission and the United States of America.

The respondents in this case are Action for Children's Television, American Civil Liberties Union, American Family Association, Inc., Association of Independent Television Stations, Inc., William Burroughs, Capital Cities/ABC, Inc., CBS Inc., Children's Legal Foundation, City Lights Booksellers and Publishers, Allen Ginsberg, David H. Halperin, Infinity Broadcasting Corporation, Intercollegiate Broadcasting System, Inc., Norman Mailer, Michael McClure, Motion Picture Association of America, Inc., Eileen Myles, National Association of Broadcasters, National Broadcasting Company, Inc., National Federation of Community Broadcasters, National Public Radio, The Pacifica Foundation, Inc., PEN American Center, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists. (Children's Legal Foundation, Inc., and American Family Association, Inc., are petitioners in No. 91-883, which seeks review of the same judgment at issue here.)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional, statutory, and regulatory provisions involved	2
Statement	3
1. Background	3
2. The court of appeals' decision in *Act I*	6
3. Congress's enactment of a 24-hour ban on indecent broadcasting	7
4. The FCC's study of indecent broadcasting	7
5. The court of appeals' decision in *Act II*	9
Reasons for granting the petition	10
Conclusion	21
Appendix A	1a
Appendix B	13a
Appendix C	39a
Appendix D	75a
Appendix E	82a
Appendix F	192a
Appendix G	194a

TABLE OF AUTHORITIES

Cases:

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988)	6, 12, 14, 16, 18
Barnes v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)	10, 19
Blodgett v. *Holden*, 275 U.S. 142 (1927)	14
City of Renton v. *Playtime Theatres*, 475 U.S. 41 (1986)	10, 19

Cases—Continued: Page

Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, In re, 4 F.C.C. Rcd 8358 (1989) 17
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 11
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) ..*passim*
Frisby v. *Schultz*, 487 U.S. 474 (1988) 15
Ginsberg v. *New York*, 390 U.S. 629 (1968) 12
Infinity Broadcasting Corp.:
2 F.C.C. Rcd 2705 (1987) 4, 5, 13
3 F.C.C. Rcd 930 (1987) 5
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981) 11
New York v. *Ferber*, 458 U.S. 747 (1982) 11
Pacifica Foundation, Inc. (KPFK-FM), 2 F.C.C. Rcd 2698 (1987) 4, 13
Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94 (1975) 4, 5
Regents of the University of California, 2 F.C.C. Rcd. 2703 (1987) 4, 13
Rowan v. *Post Office Dep't*, 397 U.S. 728 (1970).... 12
Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989) 7, 8, 10, 11, 12, 16, 18
Wilkinson v. *Jones*, 480 U.S. 926 (1987) 19
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 19

Constitution, statutes and regulation:

U.S. Const. Amend. I 2, 3, 11, 14, 15, 18, 19
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, Tit. VI, § 608, 102 Stat. 2228 .....2, 7, 16
Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172 3
18 U.S.C. 1464 .....2, 3, 4, 7, 10, 13, 16, 17, 21
47 U.S.C. 312(a)-(b) 3
47 U.S.C. 503(b)(1)(D) 3
47 U.S.C. 544(d)(2)(A) 19
47 C.F.R. 73.3999 ..... 2, 3, 7

Miscellaneous: Page

Broadcasting Yearbook (1991) 20
134 Cong. Rec. (1988):
p. 18,732 14
pp. 18,731-18,735 16
p. 23,798 16
52 Fed. Reg. 16,386 (1987) 5
Nielsen Media Research, *1990 Report on Television* 20
Radio Advertising Bureau, *Radio Facts for Advertisers—1989-1990* (1989) 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Communications Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 932 F.2d 1504. The opinion of the court of appeals in an earlier, related case (App., *infra*, 13a-38a) is reported at 852 F.2d 1332. The order of the Federal Communications Commission issuing a regulation codified at 47 C.F.R. 73.3999 (App., *infra*, 75a-81a) is reported at 4 F.C.C. Rcd 457. A report of the Commission regarding the regu-

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[1] The same judgment is the subject of the petition in No. 91-883.

lation (App., *infra*, 82a-191a) is reported at 5 F.C.C. Rcd 5297.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1991. A petition for rehearing was denied on August 28, 1991 (App., *infra*, 192a-193a). On November 18, 1991, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including December 16, 1991 (App., *infra*, 194a). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Section 1464 of Title 18 of the United States Code provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Section 608 of Pub. L. No. 100-459, Tit. VI, 102 Stat. 2228, provides:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Section 73.3999 of Title 47 of the Code of Federal Regulations provides:

The Commission will enforce the provisions of section 1464 of the United States Criminal Code, 18 U.S.C. 1464, on a twenty-four hour per day basis in accordance with Pub. L. No. 100-459.

STATEMENT

In this case, the United States Court of Appeals for the District of Columbia Circuit struck down an Act of Congress and a Federal Communications Commission regulation providing for a 24-hour-a-day prohibition on broadcasts of indecent material. The court ruled that the First Amendment obligates the Commission to "identify some reasonable period of time during which indecent material may be broadcast." App., *infra*, 10a. Under the court's decision, Congress and the FCC have no power to prohibit broadcasts of indecent material—material that describes sexual or excretory activities or organs in terms that are patently offensive under contemporary community standards for the broadcast medium—during some portion of each day.

1. *Background*

Since 1927, a federal criminal statute has made it unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172; 18 U.S.C. 1464. The prohibition encompasses both television and radio broadcasts. The FCC is empowered to enforce Section 1464 in administrative proceedings. 47 U.S.C. 312(a)-(b), 503(b)(1)(D).

In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that Section 1464's prohibition on indecent broadcasts was constitutional as applied to a daytime broadcast of a non-obscene monologue entitled "Filthy Words." In reaching that con-

clusion, the Court identified two basic justifications for regulation of indecent broadcasting: the interest in protecting "the privacy of the home" and the Nation's interest in " 'the well-being of its youth' and in supporting 'parents' claim to authority in their own household.' " *Id.* at 748-749. Accord *id.* at 756-761 (Powell, J., concurring). The Court did not, however, have occasion to determine the full extent to which those interests would sustain regulation of indecent broadcasting. See *id.* at 742, 750.

In the years immediately following *Pacifica*, the Commission limited its enforcement of Section 1464 to broadcasts substantially similar to the one at issue there—*i.e.*, to broadcasts making repeated use of the same words as the "Filthy Words" monologue. The Commission also adhered to a practice, foreshadowed in its decision in *Pacifica*, 56 F.C.C.2d 94, 99-100 (1975), of withholding sanctions for indecent broadcasts aired between 10:00 p.m. and 6:00 a.m. While considering complaints it received in 1986, however, the Commission reevaluated its position and decided to broaden its enforcement of the statutory prohibition on indecent broadcasting. It announced its revised approach in April 1987, in orders determining that three broadcasts were indecent and thus actionable under Section 1464.[2]

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[2] *Pacifica Foundation, Inc. (KPFK-FM)*, 2 F.C.C. Rcd 2698 (1987) (issuing a warning, and making a criminal referral to the Department of Justice, based upon a nighttime broadcast of excerpts of a play entitled "Jerker," which included graphic descriptions of excretion, anal intercourse, ejaculation, and oral-genital sex); *Regents of the University of California*, 2 F.C.C. Rcd 2703 (1987) (issuing a warning based upon a nighttime broadcast of a song, "Makin' Bacon," whose lyrics included explicit references to male genitals, intercourse, and oral-genital sex); *Infinity Broadcasting*

In those orders, the Commission abandoned its focus on the use of particular words and returned to the "generic" definition of indecency it had applied in *Pacifica*. Under that definition, a broadcast is indecent if it includes "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." App., *infra*, 41a & n.6. The Commission stated that material encompassed by this definition would be actionable if broadcast "when there is a reasonable risk that children may be in the audience" (*ibid.*), and it indicated that "12:00 midnight [was its] current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience," *id.* at 63a n.47.

Significantly, the Commission's revised approach to enforcement of Section 1464 was designed to serve

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Corp., 2 F.C.C. Rcd 2705 (1987) (issuing a warning based on material aired during a morning radio program that included references to male sexual organs, thinly veiled allusions to bestiality, and discussion of other sex acts). See App., *infra*, 66a-69a; 162a-186a. The first two of those broadcasts occurred after 10 p.m.; the third occurred between 6 a.m. and 10 a.m. The Commission limited itself to warnings in these cases because of the possibility that broadcasters might have relied on the policy the Commission applied following *Pacifica*. When it issued its orders in these cases, the Commission also published a notice of its revised enforcement policy in the *Federal Register*. 52 Fed. Reg. 16,386 (1987).

The Commission consolidated petitions for reconsideration of these decisions and denied them in *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd 930 (1987). We have included that decision in an appendix to this petition. App., *infra*, 39a-74a.

only "the government interest in safeguarding children from patently offensive descriptions or depictions of sexual or excretory activities or organs, so as to enable parents to decide effectively what material of this kind their children will see or hear." App., *infra*, 48a. The Commission did not invoke the other interest on which this Court had relied in *Pacifica*—the interest in the privacy of the home.

2. *The Court of Appeals' Decision in* ACT I

Various parties sought review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's new approach to indecent broadcasting. In *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [*ACT I*], the court of appeals upheld the Commission's generic definition of indecent material, but ruled that the Commission had not "adequately justified its new, more restrictive channeling approach, *i.e.*, its curtailment of the hours when nonobscene programs containing indecent speech may be broadcast." App., *infra*, 14a. The court directed the FCC to reconsider that aspect of its enforcement policy and to specify a period during which indecent broadcasting would be permitted. "[I]n view of the constitutionally protected expression interests at stake," the court declared, "the FCC must afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired." *Id.* at 35a. Accord *id.* at 35a-36a n.18 (requiring the Commission to adopt "a reasonable safe harbor rule"). The court's analysis was understandably limited to the justification for regulation of indecent broadcasting that the FCC had advanced—*i.e.*, the interest in facilitating parental supervision of children. *Id.* at 29a-30a, 36a-38a & n.20.

3. *Congress's Enactment of a 24-Hour Ban on Indecent Broadcasting*

After the *ACT I* decision, Congress enacted a statute requiring the FCC, by January 31, 1989, to "promulgate regulations in accordance with [18 U.S.C. 1464] to enforce the provisions of such section on a 24 hour per day basis." Pub. L. No. 100-459, Tit. VI, § 608, 102 Stat. 2228. The Commission responded by issuing a regulation providing for such enforcement, 47 C.F.R. 73.3999. See App., *infra*, 75a-81a.

4. *The FCC's Study of Indecent Broadcasting*

Various parties petitioned for review of the regulation. While those petitions were pending before the court of appeals, this Court issued its decision in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). In *Sable*, the Court invalidated a statute prohibiting indecent telephone messages, holding that the statute was not sufficiently tailored to the interest in denying minors access to those messages. *Id.* at 126. In reaching that conclusion, the Court observed that the legislative record underlying the statute contained no evidence regarding the effectiveness of other means of shielding minors from indecent telephone messages. *Id.* at 129-130. To address analogous issues in the context of indecent broadcasting, the Commission applied for and was granted a remand. It then commenced a proceeding to examine the factual justifications for 24-hour per day enforcement of Section 1464. App., *infra*, 84a.

The Commission solicited public comment, and received over 92,500 formal and informal submissions. App., *infra*, 85a n.6. In July 1990, it issued a report concluding that "a 24-hour prohibition on indecent broadcasts comports with the constitutional standard

* * * enunciated in *Sable* for the regulation of constitutionally protected speech." *Id.* at 85a. Relying on statistical data regarding the viewing and listening habits of minors, the Commission determined "that there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night"; that "a significant number of children in the broadcast audience are not subject to active parental supervision, even during the late evening and early morning hours"; and that those facts "warrant narrowly-tailored government regulation of indecent broadcasting aimed both at facilitating parental supervision and promoting the well-being of youth." *Id.* at 129a, 130a, 131a.

The Commission concluded that "only a 24-hour prohibition would effectively serve to protect children from broadcast indecency." App., *infra*, 145a. Because of the risk "that children are present in the viewing and listening audience at all times," the Commission explained, "it would not be possible for broadcast stations, as a general matter, to channel indecent material to certain times of the broadcast day without risk that a significant number of children will be watching or listening without meaningful parental supervision." App., *infra*, 132a. The proliferation of VCRs would "further undermine[] a channeling approach for television," the Commission continued, since "a majority of households with children have VCRs that children may operate to tape a program" —thus providing "children with access to programs broadcast at a time when their live viewing is least likely." *Id.* at 134a. The Commission also found that the use of ratings and warnings would be ineffective in limiting children's exposure to indecent

programming and that there were no available technologies that could restrict children's access to such broadcasts. *Id.* at 135a-140a.

The Commission's report found additional support for a 24-hour prohibition on indecent speech in the interest in the privacy of the home. While the Commission reaffirmed that its "primary concern" was "the protection of children from exposure to indecent materials," App., *infra*, 92a, it also found that "[t]he government's interest in preserving the privacy of the home reinforces its interest in protecting children." *Id.* at 102a.

Finally, the Commission noted that there were alternative sources of indecent material available to adults wishing to receive it, including cable television, wireless cable, home satellite dishes, and satellite master antenna television systems. "[I]mposition of a 24-hour prohibition on broadcast indecency will not," the Commission concluded, "significantly interfere with the ability of adults to view or listen to indecent programming." App., *infra*, 144a.

5. *The Court of Appeals' Decision in* ACT II

Relying exclusively on the reasoning of *ACT I*, the court of appeals struck down the FCC's regulation and the statute mandating it. The court explained, "Our holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." App., *infra*, 10a. The court refused to reconsider its prior decision in light of the intervening actions that Congress and the Commission had taken. The court dismissed the 1988 statute with the observation that "the relevant congressional debate oc-

curred without the benefit of our constitutional holding in [*ACT I*]," adding that "[n]othing else in the intervening thirty-four months has reduced the precedential force of *ACT I*." *Ibid.*

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has struck down federal legislation intended for the protection of every American household. In so doing, the court departed from fundamental principles recognized in this Court's decisions. The court gave no weight whatever to the interest in protecting "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Foundation*, 438 U.S. at 748. The court also ignored record evidence confirming the agency's judgment that anything less than 24-hour-a-day enforcement of the prohibition in Section 1464 on indecent broadcasting would expose large numbers of children to patently offensive depictions of sexual and excretory activity. Under the lower court's decision, Congress and the FCC are powerless to prevent broadcasts of any indecent material short of obscenity during some portion of each day. Under this Court's precedents, that material would include indecent nude dancing (see *Barnes* v. *Glen Theatres, Inc.*, 111 S. Ct. 2456, 2460 (1991)), adult movies (see *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986)), and sexually explicit messages like those now available in the telephone medium (see *Sable, supra*). This Court should grant review to provide full consideration of the legitimate and compelling interests that led Congress to exclude such material from the public airwaves—consideration that those interests did not receive from the court of appeals.

1. In *Pacifica*, this Court identified two fundamental justifications for regulation of indecent broadcasting. First, because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. "The ease with which children may obtain access to broadcast material," coupled with the government's "interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household,' " "amply justify special treatment of indecent broadcasting." *Id.* at 749-750. See also *id.* at 756-761 (Powell, J., concurring). For these reasons, speech that might be protected in other contexts may constitutionally be treated as a nuisance when broadcast.

These principles have lost none of their force. Recently in *Sable*, 492 U.S. at 127-128, this Court acknowledged that broadcasting's " 'unique' attributes" warrant restrictions on indecent speech that might be impermissible for other media.[3] In the course of striking down a total prohibition on indecent telephone messages, the Court stressed that the "dial-it medium requires the listener to take affirmative steps to receive the communication." *Ibid.* By contrast, the Court noted, "broadcasting is 'uniquely pervasive,'

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[3] See also *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984); *New York* v. *Ferber*, 458 U.S. 747, 757 (1982); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 & n.8 (1981) (plurality opinion).

can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" *Id.* at 127 (quoting *Pacifica*, 438 U.S. at 748-749). *Sable* thus recognized the continuing validity of *Pacifica*'s reasoning. 492 U.S. at 128.

The technological basis for regulation of broadcasting also remains intact. It is no more possible today than it was in 1978 to limit indecent broadcasting to those adults who wish to receive it. Techniques available for other media—segregation of material in locations to which only adults are admitted, access codes, lock boxes, scrambling, warnings, special packaging, and procedures enabling members of the public to express their preference not to receive indecent material—are unavailable with respect to the public airwaves.[4] "[A] physical separation of the audience cannot be accomplished in the broadcast media." *Pacifica*, 438 U.S. at 758 (Powell, J., concurring).

2. In this case, the court of appeals struck down Congress's prohibition on indecent broadcasting without giving any weight, or even any attention, to one of the two basic justifications for regulation of indecent broadcasting recognized in *Pacifica*—the fundamental interest in the protection of the privacy of the home. In disposing of this case, the court placed blanket reliance on its reasoning in *ACT I*.[5] In

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[4] Compare *Sable*, 492 U.S. at 128; *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728 (1970); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); 47 U.S.C. 544(d)(2)(A).

[5] See App., *infra*, 2a ("We believe that the disposition of this case is governed by [*ACT I*]."); *id.* at 9a ("We agree with petitioners that circuit precedent compels our rejection today of a total ban on the broadcast of indecent material."); *id.* at 10a ("Our holding in *ACT I* that the Commission must

the earlier case, however, the only issue before the court was whether the interest on which the FCC had chosen to rely—the interest in protecting parental supervision of children—was, by itself, sufficient to sustain enforcement of Section 1464 from 6 a.m. to 12 midnight. The court specifically noted in *ACT I* that the Commission had not invoked the "interest in protecting the adult listener from intrusion, in the form of offensive broadcast materials, into the privacy of the home," App., *infra*, 37a n.20, and it stressed that each aspect of its review was confined to the interest in facilitating parental supervision of children.[6]

There was no justification, of course, for adhering to the same limitation in this case. *Pacifica* recognized the constitutional validity of the interest in the privacy of the home. The legislative history of Congress's 24-hour prohibition on indecent broadcasting

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identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely."); *id.* at 11a ("Thus, neither the Commission's action prohibiting the broadcast of indecent material, nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit.").

[6] In rejecting vagueness and overbreadth challenges to the Commission's definition of indecent material, the court noted that "the sole purpose of that definition [was] to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear." App., *infra*, 29a-30a. Likewise, when it assessed the legality of the channeling approach embodied in the FCC's 1987 decisions, the court relied on the Commission's concession, at oral argument, that the sole interest underlying that approach was "the interest in protecting unsupervised children from exposure to indecent material." *Id.* at 36a-37a.

establishes that the statute was intended to advance that interest (134 Cong. Rec. 18,732 (1988) (remarks of Senator Helms)), and the Commission no longer defends its regulation of indecent broadcasting solely as a means of protecting children. See App., *infra*, 100a-102a. In determining the constitutionality of a federal statute, the "gravest and most delicate duty" that judges are called upon to perform, *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927), the court was obligated to consider all of the legitimate justifications for the statute at issue.

The court of appeals flatly refused to broaden its constitutional analysis to take account of the full range of interests justifying regulation of indecent broadcasting.[7] That refusal was a fundamental error and a serious departure from this Court's decisions. Because the interest in the protection of the privacy of the home is operative at all times of the day and night, it is a powerful justification for the total prohibition Congress and the Commission have mandated. What is more, this Court made clear in *Pacifica* that the preservation of residential privacy may outweigh the First Amendment interests of broadcasters and those adults who wish to receive indecent broadcasts. In the home, "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748.

This Court has reaffirmed the force of the interest in protecting the home from the intrusion of unwel-

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[7] The government's brief and petition for rehearing called the court's attention to the fact that the constitutional issue in this case was different than in *ACT I* and that the statute and regulation at issue here were intended to protect the privacy of the home. Gov't C.A. Br. 27-28, 33, 36 & n.21; Gov't Pet. for Reh'g 3, 13-14. See also Gov't Opposition to Motion for Summary Disposition 8-12.

come speech on a number of occasions. In *Frisby* v. *Schultz*, 487 U.S. 474, 484-485 (1988), for instance, the Court declared:

> [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. * * * There simply is no right to force speech into the home of an unwilling listener.

These privacy concerns are heightened in the context of the broadcast media. Families often gather in front of the television set. Radios routinely play while family members ready themselves for the day and engage in a variety of common household activities. Individuals of all ages tune in to the television and radio at all times of the day and night. Indecent material of the sort at issue here—patently offensive descriptions of sexual or excretory activities or organs, see note 2, *supra*—intrude on the privacy of such activities in the home, often without warning. It is of course true that offended listeners can turn off the television or radio or change the channel—but only after the invasion of privacy has occurred. The court below did not explain why the First Amendment requires listeners to endure the intrusion of patently offensive depictions of sexual and excretory activities or organs into their home, so that others who wish to receive such material need not go to the trouble of obtaining it from the wide variety of available alternative sources other than the public airwaves. See *Pacifica*, 438 U.S. at 748-749 ("To say that one may avoid further offense by turning off the

radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."); *id.* at 759 (Powell, J., concurring).

The court of appeals' refusal even to *consider* this privacy interest was especially unwarranted in view of Congress's clearly expressed dissatisfaction with prior limitations on enforcement of Section 1464. See 134 Cong. Rec. 18,731-18,735 (1988). The court dismissed the 1988 statute requiring 24-hour-per-day enforcement of Section 1464 with the observation that "the relevant congressional debate occurred without the benefit of our constitutional holding in [*ACT I*]." App., *infra*, 10a. The fact is that Congress enacted that statute *after* the decision in *ACT I*, knowing full well of the court's decision and intending to overrule it. See 134 Cong. Rec. 23,798 (1988) (remarks of Rep. Dannemeyer). Instead of suggesting that Congress should have respected the court's limited constitutional reasoning, the D.C. Circuit should have broadened its own analysis to encompass all of the legitimate justifications for restricting indecent broadcasting that had moved Congress to act.

Further review is warranted to correct this clear and unjustifiable departure from principles recognized by this Court's decisions.

3. The court of appeals' decision is seriously flawed even on its own terms. The administrative record before the court demonstrated that minors are present in the audiences for radio and television broadcasts at all times of the day and night. It cannot be said, therefore, that indecent broadcasts aired even during late night hours will reach "only a few of the most enterprising and disobedient young people." See *Sable*, 492 U.S. at 130. The court devoted no attention whatever to this issue. Here again, it placed sole reliance on the reasoning of *ACT I*, even though that

decision was rendered without the benefit of any comparable data.

The record before the court in this case included data showing, for recent years:

- that "during any given midnight to 6:00 a.m. time frame on any given day, 3,533,000 different children ages 12-17 in the United States listened to the radio for at least five minutes" (App., *infra*, 112a).
- even during the quarter hour period when listening by minors is at its lowest point, 3:45 a.m. to 4:00 a.m., 309,000 children aged 12 to 17 were in the listening audience (*ibid.*).
- that in any given week, 53.8 percent of all children aged 12-17 listened to the radio between midnight and 6 a.m. for at last five minutes.[8]
- that children aged 12 to 17 "constituted 10 to 12 percent of the post-midnight total listening audience and this percentage was generally consistent for daytime listening as well" (App., *infra*, 112a).
- "that percentage-wise, as many children ages 12-17 as adults watch television during the late evening hours, and that a higher percentage of 12 to 17 year olds than adults may watch television during these hours in some markets during the summer months" (*Id.* at 118a).
- that "66.9% of U.S. television households have videotape recorders (VCRs)" through which "children can record late night programming for viewing during daytime" (*id.* at 120a).

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[8] *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C. Rcd 8358, 8375 (1989).

There is not one word in the court of appeals' opinion questioning the Commission's findings or suggesting that Congress could not have reached similar conclusions. *Sable* makes clear that close attention to those factual issues is an indispensable element of any First Amendment analysis of a limitation on indecent speech. 429 U.S. at 128-130. Nevertheless, the court of appeals was content to reiterate *ACT I*'s conclusion that the "precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished * * * unless the FCC adopts a reasonable safe harbor rule." App., *infra*, 10a (quoting *ACT I* [App., *infra*, 36a n.18]).

In this manner, the court of appeals avoided coming to terms with the "value judgment" at the core of its decision. See *Sable*, 492 U.S. at 131 (Scalia, J., concurring). As the information in the record reflects, Congress's 24-hour prohibition on indecent speech is not subject to criticism on the ground that it is overinclusive. Children are present in the audience for late night television and radio in large numbers, and the on-off switch on the television or radio in virtually every household is the only ticket to admission. Indecent broadcasting cannot be restricted to those households in which it is welcome. Consequently, in directing the Commission to pursue greater "precision" in its regulation, the court has in fact ordered it to subordinate the Nation's compelling interests "in the 'well-being of its youth,'" "in supporting 'parents' claim to authority in their own household,'" and in the privacy of the home (*Pacifica*, 438 U.S. at 748-749) to the interests of those broadcasters who wish to transmit indecent materials to receptive adults over the public airwaves.

It is our position that the balance of interests that this Court struck in *Pacifica* may fairly be extended

to a 24-hour prohibition on indecent broadcasting. For reasons recently made clear in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991), indecent speech is only marginally within the "outer perimeters of the First Amendment."[9] Regulation of indecent broadcasting is not directed at the political or artistic content of a broadcast. "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743 n.18 (plurality opinion). Adults who wish to view or listen to indecent material may make use of a wide variety of alternative sources. Indeed, new technologies that facilitate the delivery of indecent material only to willing adults have proliferated since *Pacifica*. See App., *infra*, 140a-145a.[10] Today more than ever, prohibiting indecent materials from the public airwaves "does not by any means reduce adults to hearing only

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[9] See also *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) (it is "manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

[10] In *Wilkinson* v. *Jones*, 480 U.S. 926 (1987), this Court summarily affirmed a decision striking down a state law prohibiting indecent cable television programming. Unlike broadcasters who use the public airwaves, cable operators are required by law to offer lockboxes enabling parents to deny their children access to programming. "In order to restrict the viewing of programming which is obscene or indecent," cable operators must offer to each subscriber upon request "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. 544(d)(2)(A).

what is fit for children." *Pacifica*, 438 U.S. at 750 n.28; see *id.* at 760 (Powell, J., concurring).

In short, we believe that the interests supporting Congress's prohibition of indecent broadcasting outweigh the stake broadcasters may have in communicating such material to willing adults by means of the public airwaves. Our opponents take a different view. What is important for present purposes, however, is that the matter cannot fairly be resolved on the basis of the fiction implicit in the court of appeals's decision. A more diligent search for a "carefully-tailored" approach will not uncover a means of targeting indecent broadcasting only (or even disproportionately) at willing adults. This Court's review is warranted to assure that Congress's and the Commission's resolution of the important interests at stake receives more meaningful consideration than the court of appeals gave it.

4. Broadcasting occupies a very prominent place in the everyday lives of virtually all Americans. Ninety-two million households in the United States (98% of all households) have at least one television set, and about 65% of them have more than one set. See *Broadcasting Yearbook* A3 (1991). There are an estimated 541 million radios in the United States, 349 million of them in homes and 192 million in vehicles. *Ibid.* It is estimated that in the average television household, television sets are used more than seven hours each day. Neilsen Media Research, *1990 Report on Television* 6. Approximately 80% of all Americans aged 12 or over listen to radio each day. Radio Advertising Bureau, *Radio Facts for Advertisers*, 1989-1990, at 4. As these figures confirm, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748.

The potential effects of the court of appeals' decision are no less sweeping. Under that ruling, any broadcaster will have a constitutional right to broadcast any non-obscene material of its choosing, even if patently offensive, during some portion of every day. Because the enforceability of Section 1464's prohibition on indecent broadcasting is an issue of concern to virtually every American household, it warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1991

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* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 28, 1991 Decided May 17, 1991

No. 88-1916

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

CHILDREN'S LEGAL FOUNDATION, *et al.*, INTERVENORS

Petition for Review of an Order of the
Federal Communications Commission

Before: MIKVA, *Chief Judge*, EDWARDS and THOMAS, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: This case presents constitutional challenges to a Federal Communications Commission ("FCC" or "the Commission") order, promulgated at the direction of Congress, barring all radio and television broadcasts of "indecent" ma-

terial. We believe that the disposition of this case is governed by our prior decision in *Action for Children's Television v. Federal Communications Commission*, 852 F.2d 1332 (D.C. Cir. 1988), in which we rejected vagueness and overbreadth challenges to the Commission's definition of indecency but found that the Commission's curtailment of "safe harbor" broadcast periods impermissibly intruded on constitutionally protected expression interests. Accordingly, we grant the petition for review.

I.

The particulars of this case are best understood within the history of government efforts to regulate the broadcast of indecent material. Since 1927, federal law has prohibited the broadcast of "any obscene, indecent, or profane language." 18 U.S.C. § 1464 (1988); *see also* Radio Act of 1927, § 29, 44 Stat. 1172 (1927) (original protection against utterance of "obscene, indecent, or profane language"). In 1975, the Commission essayed to "authoritatively construe[]" the term "indecent" and to distinguish it from the modern definition of obscenity as formulated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). *See Pacifica Found.*, 56 F.C.C. 2d 94, 97 (1975). The Commission defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," and emphasized that its primary regulatory interest lay in protecting children from "language which most parents regard as inappropriate for them to hear." *Id.* at 98. The Supreme Court upheld the Commission's finding that a radio station's afternoon broadcast of a George

Carlin comedy monologue entitled "Filthy Words" was indecent under section 1464. *See Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 738-41 (1978).

The Commission, by its own account, subsequently "took a very limited approach to enforcing the prohibition against indecent broadcasts." *In re Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930 (1987) [hereinafter *Reconsideration Order*]. The Commission essentially restricted its enforcement efforts to material broadcast before 10:00 p.m. that involved "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *Id.* at 930. Between 1975 and 1987, no broadcasts at all were found actionable under this narrow prohibition. *See id.*

By 1987, however, the Commission had concluded that "the highly restrictive enforcement standard employed after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464." *Id.* Returning to the generic definition of indecency it had developed in *Pacifica*, the Commission issued three rulings declaring material that would not have violated the "Filthy Words" test to be indecent. *See Pacifica Found.*, 2 FCC Rcd 2698 (1987); *The Regents of the Univ. of California*, 2 FCC Rcd 2703 (1987); *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987); *see also New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987) (summarizing Commission policies). Significantly, two of the cited broadcasts had aired after 10:00 p.m., the time period previously identified by the Commission as a "safe harbor" during which

the risk of children in the broadcast audience was thought to be minimal. *See id.* at 2726. On reconsideration, the Commission affirmed its warnings with respect to the three broadcasts and noted, in response to requests for more specific rules regarding time channeling, that 12:00 midnight was its "current thinking" as to when the risk of children in the broadcast audience could reasonably be thought minimized. *See Reconsideration Order*, 3 FCC Rcd at 934, 937 n.47.

Reviewing the Commission's order, we first rejected petitioners' vagueness and overbreadth challenges to the Commission's generic definition of indecency. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-40 (D.C. Cir. 1988) [hereinafter *ACT I*]. However, we vacated the Commission's rulings that the two post-10:00 p.m. broadcasts were indecent. In addition to calling the Commission's findings "more ritual than real" and its underlying evidence "insubstantial," *id.* at 1341-42, we opined that a "reasonable safe harbor rule" was constitutionally mandated. *Id.* at 1343 n.18. Accordingly, we instructed the Commission to determine on remand, "after a full and fair hearing, . . . the times at which indecent material may be broadcast." *Id.* at 1344.

Before the Commission could carry out this court's mandate, Congress intervened. On October 1, 1988, two months after the *ACT I* decision issued, the President signed into law a 1989 appropriations bill containing the following rider:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United

> States Code, to *enforce the provisions of such section on a 24 hour per day basis.*

Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988) (emphasis added). Concluding that "[t]he directive of the appropriations language affords us no discretion," the Commission promulgated a new rule pursuant to section 1464 prohibiting all broadcasts of indecent materials. *See Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 457 (1988) [hereinafter *Order*], codified at 47 CFR § 73.3999 (1990) (restrictions on the transmission of obscene or indecent language). The Commission also "abandon[ed its] plans to initiate a proceeding in response to the concerns raised by" the *ACT I* panel. *Order*, 4 FCC Rcd at 457.

A panel of this court granted petitioners' motion to stay enforcement of the ban pending judicial review. *See Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Jan. 23, 1989). Six months later, while briefing on the validity of the Commission's order was underway in this court, the Supreme Court issued an opinion finding a blanket ban on indecent commercial telephone message services unconstitutional. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989). Believing that *Sable* left open the possibility that indecent broadcasts may be proscribed if the Commission could prove that no less restrictive measure would effectuate the government's compelling interests, the Commission sought and obtained a remand from this court in order to assemble the relevant data supporting a total ban. *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (remanding record to the FCC for a "full and fair hear-

ing on the issue of the propriety of indecent broadcasting").

The Commission subsequently solicited public comments on the validity of a total ban on broadcast indecency. *See Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 8358 (1989). After receiving and reviewing the comments, the Commission issued a comprehensive report concluding that "a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in *Sable* for the regulation of constitutionally protected speech." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297, 5297 (1990). Finding a "reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times" without "active" parental supervision, the Commission concluded that no alternative to a total ban would effectuate the government's compelling interest in protecting children from broadcast indecency. *See id.* at 5297, 5306. Current proceedings before the court followed issuance of the Commission's report.

II.

Petitioners, an amalgam of broadcasters, industry associations, and public interest groups, present several constitutional challenges to the Commission's action. First they claim (some more spiritedly than others) that the Commission's definition of indecency is unconstitutionally vague and overbroad. Second, they contend that a total ban on broadcast indecency cannot withstand constitutional scrutiny. We address petitioners' contentions in turn.

A. *Vagueness and Overbreadth Challenges*

Petitioners contend that the Commission's definition of indecency—"language or material that, in context, depicts or describes, in terms patently offensive as measured contemporary community standards for the broadcast medium, sexual or excretory activities or organs," *Order*, 4 FCC Rcd at 457—is unconstitutionally vague. A statute or regulation is void for vagueness if it " 'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

We have already considered and rejected a vagueness challenge to the Commission's definition of indecency. In *ACT I*, we noted that the Supreme Court entertaining a similar challenge in *Pacifica*, had quoted various elements of the definition with approval and had ultimately affirmed the Commission's application of the definition to the broadcast under review. *See ACT I*, 852 F.2d at 1338-39. In our view, the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the definition. *See id.* at 1339 ("[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction."); *cf. Information Providers' Coalition v. FCC*, No. 90-70379, Slip Op. at 2935-37 (9th Cir. March 21, 1991) (rejecting vagueness challenge to similar definition of indecency in dial-a-porn context). Our holding in *ACT I* precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague.

Some of the petitioners raise the additional claim that the definition of indecency is unconstitutionally overbroad. They contend that, because the Commission fails to recognize "serious merit" as an absolute defense to a charge of indecency, the definition sweeps even constitutionally protected expression within its ambit. *See Houston v. Hill*, 482 U.S. 451, 459 (1987) (noting that statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

We rejected an identical overbreadth challenge in *ACT I*. We noted that indecent material qualifies for First Amendment protection regardless of merit, but that even material with "significant social value" may have a strong negative impact on children. *See ACT I*, 852 F.2d at 1340. We thus found the Commission's method of identifying material suitable for broadcast only during the late night, safe harbor hours—whereby merit is treated as a "relevant factor in determining whether material is patently offensive" but "does not render such material *per se* not indecent"—to be permissible. *See id.* at 1339-40. Given that our decision today reaffirms the need for safe harbor periods during which indecent material may be broadcast and invalidates the Commission's attempt to ban such broadcasts altogether, we have no reason to revisit *ACT I*'s conclusion that the Commission's generic definition of indecency comports with constitutional overbreadth requirements.

B. *Challenge to Total Ban on Broadcast Indecency*

Petitioners' core challenge is to the constitutional validity of a total ban on the broadcast of indecent material. Their contentions are two-fold: First, they

claim that, under Supreme Court and circuit precedent, the government may not completely suppress indecent speech in any medium. Second, they argue that even if a total ban could theoretically be justified, the Commission's action here fails to satisfy the strict scrutiny standard recently reaffirmed by the Supreme Court in *Sable*.

We agree with petitioners that circuit precedent compels our rejection today of a total ban on the broadcast of in lecent material. In *ACT I*, we stated that:

> Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear.

852 F.2d at 1344. Addressing the scope of permissible regulation, we explained that:

> Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." [citation omitted] The Supreme Court has recognized a government's interest in "safeguarding the physical and psychological well-being of a minor" as "compelling." [citations omitted] But that interest, in the context of speech control, may be served only by carefully-tailored regulation.

Id. at 1343 n.18.

We found that the Commission's elimination of the post-10:00 p.m. "safe harbor" period failed to satisfy these constitutional standards. Specifically, we concluded that:

> [T]he precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule.

Id. We therefore instructed the Commission, on remand, to "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired." *Id.* at 1343.

Our holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACT I*, such a prohibition cannot withstand constitutional scrutiny. While "we do not ignore" Congress' apparent belief that a total ban on broadcast indecency is constitutional, it is ultimately the judiciary's task, particularly in the First Amendment context, to decide whether Congress has violated the Constitution. *See Sable*, 109 S. Ct. at 2838. Moreover, we note that introduction of the appropriations rider preceded issuance of our decision in *ACT I*; thus, the relevant congressional debate occurred without the benefit of our constitutional holding in that case. *See* 134 CONG. REC. S9911-S9915 (daily ed. July 26, 1988).

Nothing else in the intervening thirty-four months has reduced the precedential force of *ACT I*. Indeed, the Supreme Court's decision in *Sable*, striking down a total ban on indecent commercial telephone messages, affirmed the protected status of indecent speech and reiterated the strict constitutional standard that government efforts to regulate the content of speech

must satisfy. *See Sable*, 109 S. Ct. at 2836 (noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and stating that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). Even the Commission, prior to congressional enactment of the appropriations rider, shared this view. *See Reconsideration Order*, 3 FCC Rcd at 931 (dismissing suggestion that section 1464 should be read to totally prohibit the broadcast of indecent material, as such a reading would "run afoul of [the] constitutional premise" that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material").

Thus, neither the Commission's action prohibiting the broadcast of indecent material nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit.

III.

We appreciate the Commission's constraints in responding to the appropriations rider. It would be unseemly for a regulatory agency to throw down the gauntlet, even a gauntlet grounded on the Constitution, to Congress. But just as the FCC may not ignore the dictates of the legislative branch, neither may the judiciary ignore its independent duty to check the constitutional excesses of Congress. We hold that Congress' action here cannot preclude the

Commission from creating a safe harbor exception to its regulation of indecent broadcasts.

Our decision today effectively returns the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of the appropriations rider. The Commission should resume its "plans to initiate a proceeding in response to the concerns raised" in *ACT I*, which it "abandon[ed]" following Congress' mandate. *Order*, 4 FCC Rcd at 457. We direct the Commission, in "redetermin[ing], after a full and fair hearing, . . . the times at which indecent material may be broadcast," to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts. *See ACT I*, 852 F.2d at 1341-44.

For the foregoing reasons, the petition for review is granted, the order under review is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1064

ACTION FOR CHILDREN'S TELEVISION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

MONROE COMMUNICATIONS CORPORATION, MEDIA CENTRAL, INC., ET AL., AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ET AL., INTERVENORS

Argued June 1, 1988

Decided July 29, 1988

As Amended July 29, 1988

Before ROBINSON, RUTH BADER GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH BADER GINSBURG.

RUTH BADER GINSBURG, Circuit Judge:

In these three cases, the Federal Communications Commission (FCC or Commission) readdressed the

subject, earlier aired in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (*Pacifica*), of indecent language in radio broadcasts. The Commission decided that the enforcement standard it had employed from 1975 until 1987 was unduly narrow. It therefore declared in these cases a changed standard, one concededly more difficult to administer.[1]

We uphold the generic definition the FCC has determined to apply, case-by-case, in judging indecency complaints, but we conclude that the Commission has not adequately justified its new, more restrictive channeling approach, *i.e.*, its curtailment of the hours when nonobscene programs containing indecent speech may be broadcast. Two of the three cases before us involve programs aired after 10:00 p.m. One involves a show aired 6:00-10:00 a.m. Observing that the FCC, mindful of the licensee's reliance on prior Commission rulings, imposed no sanctions, we affirm the Commission's declaratory warning order regarding the show aired 6:00-10:00 a.m. We vacate the FCC's orders regarding the post 10:00 p.m. broadcasts and remand those cases to the Commission with instructions to reopen the time limitation or channeling aspect of the rulings for fresh decision on a full record and in a manner sensitive to these considerations: (1) the speech at issue, as the FCC has acknowledged, is protected by the first amendment; (2) the Commission's avowed objective is not to establish itself as censor but to *assist parents* in controlling the material young children will hear.

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[1] In re Infinity Broadcasting Corp. of Pennsylvania, 64 Rad.Reg.2d (P & F) 211 (1987) (*Reconsideration Order*).

I.

Petitioners in this case are commercial broadcasting networks, public broadcasting entities, licensed broadcasters, associations of broadcasters and journalists, program suppliers, and public interest groups; they seek review of a December 1987 FCC order which affirmed, on reconsideration, three April 1987 rulings,[2] and announced a new gauge for administering the restraint, imposed by 18 U.S.C. § 1464 (1982),[3] on the use of indecent language in radio communications. The Commission also warned broadcasters that "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired"; instead, 12:00 midnight is the FCC's "current thinking" on "a reasonable delineation point." *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad.Reg.2d (P & F) 211, 219 n. 47 (1987) (*Reconsideration Order*).

Petitioners maintain that the FCC's broadened indecency enforcement standard is facially invalid because unconstitutionally vague. Intervenors American Civil Liberties Union Foundation (ACLU), *et al.* present a second facial challenge: the FCC's mode of stamping material indecent, they contend, is substantially overbroad. Petitioners also urge that the

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[2] In re Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987) (*Infinity*); In re Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987) (*Pacifica Foundation*); In re Regents of the University of California, 2 FCC Rcd 2703 (1987) (*Regents of U.C.*).

[3] Section 1464 reads:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Commission's action is arbitrary and capricious because the change in regulatory course was not accompanied by the requisite "reasoned analysis."

Adhering to the view that broadcast material that is indecent but not obscene may be channeled to certain times of day, but not proscribed entirely,[4] the FCC indicated in its *Reconsideration Order* that 12:00 midnight to 6:00 a.m. would be "safe harbor" hours for such material. 64 Rad. Reg.2d at 217, 219 n. 47. Petitioners, joined by intervenors ACLU *et al.*, contend that this time restraint, stretching to all but the hours most listeners are asleep, lacks record support and, in violation of the first amendment, effectively denies adults access to constitutionally-protected material.

We hold that the FCC adequately explained why it decided to change its enforcement standard. Consideration of petitioners' vagueness challenge, we conclude, is not open to lower courts, in view of the Supreme Court's 1978 *Pacifica* decision. Intervenors' overbreadth plea, we rule, is not effective argument to the extent that it attacks the FCC's generic definition of indecent material.

We further hold, however, that the FCC failed to adduce evidence or cause, particularly in view of the first amendment interest involved, sufficient to support its hours restraint; consequently, we vacate two of the FCC's declaratory orders and remand for reconsideration of the times at which programs containing indecent material may be broadcast.

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[4] The Commission thus rejected the argument pressed by Morality in Media (MIM), and repeated by MIM here as amicus curiae; MIM urged that all indecent material (defined more broadly than the FCC has allowed) should be proscribed, because that is what the statute mandates.

II.

In 1978, in *Pacifica*, the Supreme Court upheld the FCC's authority to regulate a radio broadcast that is indecent but not obscene. The Court ruled that 47 U.S.C. § 326 (1982), which forbids FCC "censorship," does not deny the Commission power "to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting." 438 U.S. at 738, 98 S.Ct. at 3034. The Court concluded that the specific broadcast material in question in *Pacifica*—a recording of a George Carlin monologue titled "Filthy Words"—was indecent within the meaning of section 1464. In so ruling, the court rejected the broadcaster's objection that the definition of indecent material must include the element of prurient appeal. *Id.* at 741, 98 S.Ct. at 3036. On narrow grounds, the Court held that the FCC order under review in *Pacifica* did not transgress constitutional limits; the first amendment, according to the Court, did not proscribe the Commission's case-specific determination that the Carlin monologue was subject to regulation because his performance captured on a record was "indecent as broadcast." *Id.* at 734, 750, 98 S.Ct. at 3032, 3040.

In the Commission's 1975 *Pacifica* order, 56 F.C.C. 2d 94 (1975), the FCC stated that "to avoid the error of overbreadth," it was important to be "explicit" about "whom we are protecting and from what"; the Commission then advanced this definition of "the concept of 'indecent' " in relation to broadcast material: "exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 98 (also reiterating that regulation is in order only

"at times of the day when there is a reasonable risk that children may be in the audience"). At the start of its 1975 opinion, the FCC had announced: "We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of 'indecent' language." *Id.* at 94. On reconsideration, 59 F.C.C. 2d 892 (1976), however, the Commission retrenched and stressed that its *Pacifica* ruling was made "in a specific factual context"; the Commission therefore declined to "comment on the various hypothetical situations posed by [petitioner Radio Television News Directors Association]." *Id.* at 893.

Following the Supreme Court's narrow affirmance of the Commission's 1975 *Pacifica* order, *see* 438 U.S. at 750, 98 S.Ct. at 3040, the FCC consistently reported that it would not essay expansive interpretation of the indecency concept. *See, e.g., In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978):

> [*Pacifica*] affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question.

Repetitious use of Carlin's "seven dirty words" effectively became the FCC's yardstick for "indecency," and broadcasts after 10:00 p.m. were deemed not actionable. *See* Brief for Respondents at 7. No broadcasts were in fact found actionable after 1975, until

the instant rulings. *Reconsideration Order*, 64 Rad. Reg.2d at 214 para. 4.

On April 29, 1987 the Commission released three decisions, each of which declared "indecent" material which would not have been so identified under the prior FCC standard; two of the broadcasts had aired after 10:00 p.m. *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987) (*Infinity*); *In re Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (*Pacifica Foundation*); *In re Regents of the University of California*, 2 FCC Rcd 2703 (1987) (*Regents of U.C.*). In the *Infinity* case, the FCC held actionable portions of the Howard Stern talk show, which airs from 6:00 to 10:00 a.m. Monday through Friday; in *Pacifica Foundation*, the Commission made a similar ruling regarding excerpts of a play titled "Jerker," broadcast between 10:00 and 11:00 p.m. on a Sunday evening; in *Regents of U.C.*, the FCC held actionable the broadcast of the song "Makin' Bacon" on a Saturday after 10:00 p.m.

Together with its decision in the *Infinity*, *Pacifica Foundation*, and *Regents of U.C.* cases, the FCC issued on April 29, 1987, a Public Notice summarizing the three orders released that day and "put[ting] all broadcast and amateur radio licensees on notice as to new standards that the Commission will apply in enforcing the prohibition against obscene and indecent transmissions." *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 62 Rad.Reg.2d (P & F) 1218 (1987). The Commission received multiple petitions for reconsideration and clarification. In response, the FCC issued a single reconsideration order in which it affirmed the three individual rulings, addressed comments and questions it had received, and elaborated

on the rationale for the change in policy. *Reconsideration Order*, 64 Rad.Reg.2d 211. Petitioners now seek review of the reconsideration order.

III.

As a threshold matter, the FCC contends that this court should follow the model set by the High Court in *Pacifica*, 438 U.S. at 734-35, 98 S.Ct. at 3032-33, and accordingly review nothing more than the three specific FCC holdings declaring material "indecent as broadcast." *See Brief* for Respondents at 28-29.[5] The Commission thus would have us consider only the questions whether, in each case, the broadcast material was indecent, *id.*, and if it was, then whether the indecent material was aired at a time when there was a reasonable risk that children may have been in the audience. *Id.* at 42. The agency action we confront, however, appears to us sufficiently distinct from that involved in *Pacifica* as to warrant a different judicial response.

The *Pacifica* Court had before it a single, narrowly focused agency order. Though the FCC had articulated a generic definition of indecency, *see supra* p. [17a-18a], the Commission also noted that "the number

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[5] Intervenor Monroe Communications Corporation advances a related argument, suggesting that review of the FCC's generic definition of indecency is inconsistent with the *Pacifica* Court's recognition that "context" is "all-important" in determining whether a particular transmission is indecent. Brief of Intervenor Monroe Communications Corp. at 6 (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 750, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978)). That consideration cannot preclude facial challenges to the FCC's generic definition where, as here, the Commission has plainly stated its intention to apply the definition in a variety of factual "contexts." *See infra* pp. [21a-22a].

of words which fall within the definition of indecent is clearly limited." 56 F.C.C. 2d at 99-100. On reconsideration, the Commission declined to respond to a request that it apply the generic definition to news and public affairs programming. 59 F.C.C.2d at 892-93. In its brief to the Supreme Court the FCC emphasized the narrowness of its ruling. Quoting extensively from Judge Leventhal's dissent in the Court of Appeals, *Pacifica Foundation v. FCC*, 556 F.2d 9, 30-37 (D.C.Cir. 1977), the FCC stressed that its ruling carried with it the limiting conditions of certain words repeated over and over, and the early afternoon timing of the Carlin broadcast. Brief for the Federal Communications Commission at 41-43, *Pacifica* (No. 77-528). The Commission also directed the Court's attention to a then-pending legislative proposal advanced by the FCC which featured a safe harbor for the airing of indecent material. *Id.* at 43 n. 31; *see* Legislative Proposal, 122 CONG.REC. 33,359, 33,364 (1976) (safe harbor from 11:00 p.m. to 7:00 a.m.). The Supreme Court concluded that the FCC's decision concerning the Carlin monologue should be treated strictly as an ad hoc ruling. *Pacifica*, 438 U.S. at 734, 98 S.Ct. at 3032.

In contrast, in the present cases the FCC has left no doubt that it has stated a standard it expects to apply generally, not a prescription peculiarly fitted to the three individual broadcasts. *See Reconsideration Order*, 64 Rad.Reg.2d at 214 para. 5, 216 para. 15 ("Broadcasters, when judging whether certain material is legally indecent, . . . must apply a generic definition with reference to the guidance provided by existing case law on the matter."). The Commission, indeed, suggested no theme or principle uniting the three disparate cases other than the generic definition itself.

The FCC's current procedural course differs notably from the route the Commission followed in the first *Pacifica* case. The three individual rulings here were accompanied by a Public Notice alerting all broadcasters to the new, generic standard by which broadcasts would be judged. 62 Rad.Reg.2d at 1218-19.[6] The bulk of the FCC's *Reconsideration Order* was devoted to the comments and concerns of parties not directly affected by the three individual rulings; the latter were treated summarily. 64 Rad.Reg.2d at 217-18 paras. 18-23. The *Reconsideration Order* reads more nearly like the result of a notice-and-comment rulemaking than of an ad hoc adjudicatory proceeding.[7]

We conclude that the agency has employed the informal adjudication format to promulgate a rule of general applicability. Certainly the FCC may choose the mode by which it proceeds. *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581, 91 L.Ed. 1995 (1947). However, the agency may not resort to adjudication as a means of insulating a generic standard from judicial review. We therefore address petitioners' and intervenors' challenges to the FCC's generic definition of indecency and the specification of the times at which indecent material may be broadcast.

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[6] We do not decide whether, as petitioners contend, the Public Notice is independently reviewable. *See* Reply Brief of Petitioners at 3. The FCC's generic definition of indecency is adequately presented for review in the *Reconsideration Order*. *See infra* [p. 23a].

[7] The court "reviews not the label but the agency pronouncement that underlies the label," and "it is that pronouncement itself that governs the determination of its status." *Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101, 105 (D.C.Cir. 1987).

IV.

The FCC acknowledges a change of regulatory course: The Commission now measures broadcast material against the generic definition of indecency, while formerly "no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *Reconsideration Order*, 64 Rad.Reg.2d at 213 para. 4. Petitioners charge that the Commission has failed to supply an adequate explanation for the change. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C.Cir.1987). Specifically, petitioners say that the Commission, directly after *Pacifica*, had tailored the standard to make it reasonably certain and to afford broadcasters ample breathing space. Brief of Petitioners at 39. The new standard, they contend, is "inherently vague" and was installed without any evidence of a problem justifying a thickened regulatory response. *Id.*

The explanation offered by the Commission, in its *Reconsideration Order*, is that it found the deliberately-repeated-use-of-dirty-words policy "unduly narrow as a matter of law" and inconsistent with its obligation responsibly to enforce section 1464. 64 Rad.Reg.2d at 214 para. 5. The former approach permitted the unregulated broadcast of any material that did not contain Carlin's "filthy words," no matter how the material might affect children exposed to it. It made no legal or policy sense, the FCC said, to regulate the Carlin monologue but not "material that portrayed sexual or excretory activities or or-

gans in as patently offensive a manner . . . simply because it avoided certain words." *Id.*

We find the FCC's explanation adequate. Short of the thesis that *only* the seven dirty words are properly designated indecent—an argument petitioners disavow—some more expansive definition must be attempted. The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results. No reasonable formulation tighter than the one the Commission has announced has been suggested in this review proceeding. The difficulty, or "abiding discomfort," we conclude, is not the absence of "reasoned analysis" on the Commission's part, but the "[v]agueness . . . inherent in the subject matter." *Pacifica Foundation v. FCC*, 556 F.2d at 35 (Leventhal, J., dissenting). We turn next to that issue.

V.

Petitioners charge that the term "indecent" is inherently unclear, and that the FCC's generic definition of indecency adds nothing significant in the way of clarification. The Commission's definition, petitioners therefore contend, provides broadcasters no meaningful guide identifying the category of material subject to regulation; accordingly, petitioners urge, the definition should be ruled unconstitutionally vague. In our view the Supreme Court's disposition of *Pacifica* stops "what the Constitution calls an 'inferior court' " from addressing this question on the merits. *Cf. Pacifica Foundation v. FCC*, 556 F.2d at 37 (Leventhal, J., dissenting) (referring to duty of "inferior court" to apply Supreme Court decisions endeavoring "to resolve the 'intractable' question of obscenity").

The generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case.[8] However, the Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague.[9] The Court did hold the Carlin monologue indecent within the meaning of section 1464. 438 U.S. at 741, 98 S.Ct. at 3036. We infer from this holding that the Court did not regard the term "indecent" as so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). The Court referred to the "normal definition of 'indecent,' " quoted a dictionary definition, and noted that the Commission's definition uses "indecency" to indicate "patent offensiveness." 438 U.S. at 740 & nn. 14, 15, 98 S.Ct. at 3035-36 & nn. 14, 15.

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[8] In 1975 the Commission included in its definition of indecent material the element that material be broadcast "at times of the day when there is a reasonable risk that children may be in the audience." In re Pacifica Foundation, 56 F.C.C.2d 94, 98 (1975). The Commission now treats the nature of the material involved and the time of day when it is broadcast separately; the time of a broadcast is pertinent to whether it is actionable, not whether it is indecent. Nevertheless, a violation of section 1464 must be predicated on the same components relevant under the 1975 formulation: whether material is indecent and whether it was broadcast when there was a reasonable risk of children in the audience. *Reconsideration Order*, 64 Rad.Reg.2d at 213 n. 6.

[9] The argument that the term "indecent" in section 1464 is unconstitutionally vague (if not synonymous with "obscene") was made to the Supreme Court in the *Pacifica* case. Brief for Amici Curiae American Broadcasting Cos., Inc. *et al.*, *Pacifica* (No. 77-528).

Moreover, while observing that the Pacifica Foundation took issue with the FCC's definition of indecency, the Court quoted elements of the definition with seeming approval: "The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent." The Court ultimately declared: "When [Pacifica's] construction [that prurient appeal is an essential component of indecent language] is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast." *Id.* at 741, 98 S.Ct. at 3036. In sum, if acceptance of the FCC's generic definition of "indecent" as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.

VI.

Intervenors ACLU *et al.* argue that the FCC's generic definition of indecency is substantially overbroad. As we read *Pacifica*, only two members of the five-member majority thought it in order to rule on overbreadth,[10] so we proceed to address that issue

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[10] In *Pacifica*, Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, declined to address Pacifica's overbreadth challenge "because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." 438 U.S. at 742, 98 S.Ct. at 3037. Justice Powell, however, in a concurring opinion joined by Justice Blackmun, appears to have concluded that the overbreadth argument should fail on the merits: "[S]ince the Commission may be expected to proceed cautiously, as it has

on the merits. The ACLU's challenge is predicated on the absence of redemption from indecency status for material that has "serious merit." We hold that "serious merit" need not, in every instance, immunize indecent material from FCC channeling authority.

Statutes or regulations "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, [482 U.S. 451], 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987). According to intervenors, a proper definition of indecency would include the requirement that the "work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Brief of Intervenors ACLU *et al.* at 30 (quoting from *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973)). Observing that social value entitles otherwise unprotected obscene expression to first amendment protection, the ACLU contends that "it must also be true that social importance requires full protection for otherwise merely 'indecent' expression." Brief of Intervenors ACLU *et al.* at 31.

The Commission urges that its position is "not all that far apart" from the ACLU's on this issue. Brief for Respondents at 38. The FCC recognizes "serious merit" as "a relevant factor in determining whether material is patently offensive"; taking into account the aim of broadcast indecency regulation to protect children, and the channeling solution at stake, however, the FCC has "reject[ed] an approach that would hold that if a work has merit, it is *per se* not

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in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 761 n. 4, 98 S.Ct. at 3047 n. 4 (Powell, J., concurring) (citation omitted).

indecent." *Reconsideration Order*, 64 Rad.Reg.2d at 216-17 para. 17.

Indecent but not obscene material, we reiterate, qualifies for first amendment protection whether or not it has serious merit.[11] Children's access to indecent material, however, may be regulated, because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .'" *Ginsberg v. New York*, 390 U.S. 629, 638, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) (quoting *Prince v Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444; 88 L.Ed. 645 (1944)). Channeling is designed to protect unsupervised children.[12] *See infra* pp. [36a-37a]. Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value.[13] Since the overall value of a work will

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[11] As Justice Powell commented in *Pacifica*, except in the context of commercial speech, it is not the prevailing view that the degree of protection the first amendment provides depends on the Court's judgment as to the "value" of the speech in question. *See* 438 U.S. at 761-62, 98 S.Ct. at 3047 (Powell, J., concurring); *see also id.* at 762-63, 98 S.Ct. at 3047 (Brennan, J., dissenting) ("[T]he Court refuses to embrace the notion . . . that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court.").

[12] Broadcasting is a unique medium; it is not possible simply to segregate material inappropriate for children, as one may do, *e.g.*, in an adults-only section of a bookstore. Therefore, channeling must be especially sensitive to the first amendment interests of broadcasters, adults, and parents.

[13] The Carlin monologue itself may be an example of indecent material possessing significant social value. *See*

not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material *per se* not indecent. *See Reconsideration Order*, 64 Rad.Reg.2d at 216-17 para. 17. The FCC's definition, therefore, is not vulnerable to the charge that it is substantially overbroad.[14]

VII.

We have upheld the FCC's generic definition of indecency in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and

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Pacifica, 438 U.S. at 730, 98 S.Ct. at 3000 (broadcaster explained that the "monologue had been played during a program about contemporary society's attitude toward language" and that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words").

Other examples that come readily to mind include descriptions of the doings of Gargantua and Pantagruel in Rabelais' classic, certain passages in the works of Joyce, words and phrases found in the writings of D.H. Lawrence, James Baldwin, and Frank Harris.

[14] Though declining to defer absolutely to broadcasters' judgments of what is or is not indecent, the FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. *Cf. Reconsideration Order*, 64 Rad.Reg.2d at 218-19 paras. 26, 27 & n. 44. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy. *See also supra* note 10 (Justice Powell states expectation that Commission will continue to proceed cautiously).

phrases their parents regard as inappropriate for them to hear. *See Reconsideration Order*, 64 Rad. Reg. at 213 para. 2. Petitioners press two linked objections to the FCC's "current thinking" that 12:00 midnight is the hour after which indecent material may be broadcast without sanctions.[15] The FCC's channeling decision is arbitrary and capricious, petitioners contend, because it is not based on an adequate factual or analytic foundation. *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. Tied to and coloring that contention, petitioners charge that the Commission's action regarding channeling violates the first amendment because it reduces adults to seeing and hearing material fit only for children. *See Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957).

We agree that, in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn. We therefore vacate, in the *Pacifica Foundation* and *Regents of U.C.* cases, the FCC's ruling that the broadcast under review was actionable, and we remand those cases to the agency for thoroughgoing reconsideration of the times at which indecent material may be aired.

We are impelled by the Supreme Court's *Pacifica* decision, however, to affirm the declaratory ruling in *Infinity*. The FCC in that case held actionable portions of a talk show that airs 6:00-10:00 a.m. Monday through Friday. In *Pacifica*, the Court affirmed

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[15] Petitioners do not challenge the FCC's requirement that programs containing indecent material be preceded by appropriate warnings. *See Reconsideration Order*, 64 Rad.Reg.2d at 220 para. 29. That aspect of the Commission's channeling regulation is not affected by this decision.

a similar declaratory order regarding material broadcast 2:00 p.m. on a Tuesday. No principle has been suggested to us under which we might rationally command different treatment of the *Infinity* early morning program and the *Pacifica* early afternoon broadcast, viewing those broadcasts in the context of the parent-child concerns underpinning the FCC's indecent speech regulation. Having upheld the Commission's standard for "indecent material," we conclude that the FCC's adjudication in *Infinity* must remain in place just as the Supreme Court ordered with respect to the Commission's adjudication in *Pacifica*. The FCC itself, however, would be acting with utmost fidelity to the first amendment were it to reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions. *Cf. infra* note 21.

Each of the April 29, 1987 rulings reported an FCC finding that the broadcast occurred at a time of day when there was a reasonable risk that children may have been in the audience. In *Pacifica Foundation*, involving a 10:00-11:00 p.m. broadcast, the Commission relied on ratings data indicating that "approximately 112,200 children aged 12-17 are in the Los Angeles metro survey area radio audience per average quarter hour between 7 p.m. and midnight on Sunday night." 2 FCC Rcd at 2699. In *Regents of U.C.*, involving a program aired after 10:00 p.m., available data indicated that

> approximately 1,200 children between 12 and 17 years of age are still in the radio audience per average quarterhour in the Santa Barbara area between 7 p.m. and midnight on Saturday evenings. There are approximately 4,900 children within this age group within the City of Santa Barbara itself and 27,800 in the county.

2 FCC Rcd at 2704 n. 10.

Even were we to treat each of the two rulings solely as an ad hoc adjudication, we would regard the evidence on which the Commission rested its channeling decisions as insubstantial, and its findings more ritual than real. It is familiar law that an agency treads an arbitrary course when it fails to "articulate any rationale connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962); *see also Independent U.S. Tanker Owner Comm. v. Lewis*, 690 F.2d 908, 922 (D.C.Cir. 1982) (applying same standard to informal adjudication). We conclude that the Commission followed such a course here.

In each instance under inspection the cited population figures appear to estimate the number of teens in the *total* radio audience. There is no indication of the size of the predicted audience for the specific radio stations in question. *Cf. Reconsideration Order*, 64 Rad.Reg.2d at 217 para. 18.

More troubling, the FCC ventures no explanation why it takes teens aged 12-17 to be the relevant age group for channeling purposes.[16] In the Commission's 1976 legislative proposal, cited to the Supreme Court in the FCC's *Pacifica* brief, the Commission would have required broadcasters to minimize the risk of exposing to indecent material children *under* age 12. The FCC reasoned: "Age 12 was selected since it is the accepted upper limit for children's programming in the industry and at the Commission. The Commis-

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[16] The FCC notes on brief that the ratings services do not publish figures for children under 12, Brief for Respondents at 44 n. 46, but the orders under review do not mention that fact. Nor did the Commission say how it uses the 12-17 age group figures to reach conclusions about the younger group.

sion considered using the generally recognized age of majority—18—but concluded that it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year-olds." 122 CONG.REC. at 33,367 n. 119. The FCC further referred to the distinction between obscene and merely indecent material in observing that "a reduced age seemed in order." *Id.* We cannot tell from the record before us whether the Commission is now spreading the focus of its concern to children over 12. *See* Brief for Respondents at 44 n. 46. If it is thus widening its sights, that apparent change in policy warrants explanation. If, on the other hand, the FCC continues to consider children under 12 as the age group of concern, it should either supply information on the listening habits of children in that age range, or explain how it extrapolates relevant data for that population from the available ratings information.

Furthermore, we note that in the Los Angeles case there is no basis for comparison between the number of teens estimated to be in the radio audience and the total number of teens in the listening area. In Santa Barbara, for which comparative data are available, the figure attracting the FCC's concern amounts to, at most, 4.3 percent of the age group population.[17] The Commission published no reason why it determined that the potential exposure of four percent of all children amounts to a "reasonable risk" for channeling purposes.

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[17] The ratings services estimated 1,200 children 12-17 years old in the radio audience, of a total population in that age group of 4,900 within the City of Santa Barbara and 27,800 in the county. Since it is not clear whether the county figure includes the city population, the precise percentage is unknown; the estimated radio audience comprises 3.7 to 4.3 percent of the total age-group population.

We do not, however, remand solely for reconsideration of the individual rulings. In the *Reconsideration Order* the FCC offered some advice to broadcasters:

> [W]hereas previously we indicated that 10:00 p.m. was a reasonable delineation point, we now indicate that 12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience.

64 Rad.Reg.2d at 219 n. 47. The Commission next listed several competing interests, *see infra* p. [36a], and said that its approach accommodated them. As noted by Commissioner Dennis, however, "the arguments the majority gives in support of midnight as the critical hour may well be equally true if applied to an earlier hour." *Id.* at 220 (Dennis, Comm'r, concurring). We agree that the FCC's midnight advice, indeed its entire position on channeling, was not adequately thought through.

At oral argument of this case on June 1, 1988, General Counsel for the FCC suggested that if this court found the midnight safe harbor problematic, we could disregard it and permit the Commission to make future channeling decisions on a case-by-case basis. However, the FCC itself has recognized that "the effect of that approach may well be to cause broadcasters to forego the broadcast of certain protected speech altogether, rather than to channel it to late night hours." *Id.* at 219 n. 47. In common with the Commission, we are constrained to agree with that assessment. Facing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a safe harbor for the broadcast of (possibly)

indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated. We conclude that, in view of the constitutionally protected expression interests at stake, the FCC must afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.[18]

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[18] In the 1987 *Pacifica Foundation* order the FCC suggested that channeling can be viewed as a valid time, place, and manner restriction on speech. 2 FCC Rcd at 2699 para. 14 & n. 3; *cf. Reconsideration Order*, 64 Rad.Reg.2d at 215 para. 12. We disagree. Time, place, and manner regulations must be content-neutral. *Pacific Gas & Elec. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20, 106 S.Ct. 903, 913, 89 L.Ed.2d 1 (1986). Channeling, however, is a content-based regulation of speech. *See Boos v. Barry*, [485 U.S. 312], 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988) (plurality opinion of O'Connor, J.): "Regulations that focus on the direct impact of speech on its audience [are not content-neutral]. To take an example factually close to *Renton* [*v. Playtime Theatres, Inc.*, 475 U.S. 41 [106 S.Ct. 925, 89 L.Ed.2d 29] (1986) (ordinance regulating adult-movie theaters)], if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." *See also id.* at 1171 (Brennan., J., concurring): "[A]ny restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it."

Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980). The Supreme Court has recognized a government's interest in "safeguarding the physical and psychological well-being of a minor" as "compelling." *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596,

It is not within our authority to instruct the FCC to establish a safe harbor by means of a rulemaking proceeding. *See Chenery*, 332 U.S. at 203, 67 S.Ct. at 1581. We call attention, however, to the clear statement made by one Commissioner: "The fact is the Commission has no scientific body of information that conclusively establishes one time as more appropriate than another as the critical hour after which to permit broadcast of indecent speech. What is necessary is a notice of proposed rulemaking to establish a record." *Reconsideration Order*, 64 Rad.Reg.2d at 220 (Dennis, Comm'r, concurring). The inadequate record relevant to channeling made in the cases the Commission adjudicated lends support to that Commissioner's view.

The FCC noted that a channeling decision must accommodate these competing interests:

> (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene.

Id. at 219 n. 47. At the June 1, 1988 oral argument, the FCC's General Counsel, in response to the court's

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607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982)). But that interest, in the context of speech control, may be served only by carefully-tailored regulation. Here, the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule.

inquiry, clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes.[19] Therefore the first two interests identified by the FCC coalesce; the government's role is to facilitate parental supervision of children's listening. "[T]he Commission is advancing the government interest in safeguarding children from patently offensive [material], so as to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 215 para. 11.[20] Thus, the FCC must endeavor to determine what channeling rule will most effectively promote parental—as distinguished from government—control.[21]

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[19] *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM.L.REV. 391, 413 n. 68 (1963) ("While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit.").

[20] The *Pacifica* Court also identified an interest in protecting the adult listener from intrusion, in the form of offensive broadcast materials, into the privacy of the home. 438 U.S. at 748-49, 98 S.Ct. at 3040; *see also id.* at 759-60, 98 S.Ct. at 3045-3046 (Powell, J., concurring). Neither the *Reconsideration Order* nor the underlying rulings relies on that rationale, however.

[21] Petitioners argue cogently that parental authority is enhanced, not reduced, if government permits programming at hours outside the workday hours common in the community, when most parents can supervise their children's listening. *See also Pacifica Foundation v. FCC*, 556 F.2d at 36 (Leventhal, J., dissenting) ("[F]or homes where parents really care about such matters there would be at least one parent in a position to monitor the material heard and seen

A securely-grounded channeling rule would give effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech. Such a rule would present a clearly-stated position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement.

CONCLUSION

Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear. We have concluded that, under governing precedent, the FCC's definition of indecent broadcast material, though vagueness is inherent in it, is not constitutionally defective, and that the Commission's declaratory order in *Infinity*, 2 FCC Rcd 2705, must be affirmed. But we have also found that the FCC has not implemented its authority to channel such material in a reasonable manner. We therefore vacate in part the reconsideration order under review and return *Pacifica Foundation*, 2 FCC Rcd 2698, and *Regents of U.C.*, 2 FCC Rcd 2703, to the Commission for redetermination, after a full and fair hearing, of the times at which indecent material may be broadcast.

It is so ordered.

[in the early evening]. A rule expanding the zone of the broadcastable to adult levels might apply when the time of broadcast is such that the great preponderance of children are subject to parental control.").

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INFINITY BROADCASTING CORPORATION OF PENNSYLVANIA,
Licensee of Station WYSP(FM)

In the Matter of

PACIFICA FOUNDATION, INC.
Licensee of Station KPFK-FM,
Los Angeles, Ca.

In the Matter of

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Licensee of Station
KCSB-FM, Santa Barbara, Ca.

MEMORANDUM OPINION AND ORDER

Adopted: November 24, 1987;

Released: December 29, 1987

By the Commission: Commissioner Dennis concurring and issuing a statement.

I. BACKGROUND

1. The Commission has before it for consideration petitions and comments [1] pertaining to three rulings adopted on April 16, 1987, involving the prohibition contained in 18 U.S.C. § 1464 against the broadcast or transmission of indecent material.[2] See *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (*KPFK-FM*); *The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (*KCSB-FM*); *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987) (*WYSP (FM)*).[3]

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[1] These include a Petition for Clarification, filed June 1, 1987, by the National Association of Broadcasters (NAB Petition); a Petition for Reconsideration, filed June 1, 1987, by Action for Children's Television, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBS Inc., EZ Communications, Inc., Motion Picture Association of America, Inc., National Broadcasting Company, Inc., National Public Radio, The New York Times Company, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists, Sigma Delta Chi (ACT Petition) (collectively "petitioners); Comments, filed June 15, 1987, by the Maryland-District of Columbia-Delaware Broadcasters Association (MDCD); Comments, filed July 6, 1987, by Morality In Media, Inc. (MIM); and, Reply Comments, filed July 21, 1987, by ACT.

[2] 18 U.S.C. § 1464. The section provides: "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than 10,000 or imprisoned not more than two years, or both."

[3] Also decided the same day was a case involving indecent transmissions by an amateur radio licensee. *David Hildebrand (N6BHU)*, 2 FCC Rcd 2708 (1987). Shortly afterward, the Commission issued a public notice, in which it summarized the orders and indicated that it was putting all licensees on

2. The Communications Act of 1934, as amended, empowers the Commission to impose administrative sanctions for violations of Section 1464, including warnings, imposition of fines and, in severe cases, the revocation of licenses.[4] In 1975, the Commission ruled that a 12-minute monologue by comedian George Carlin entitled "Filthy Words" broadcast by Station WBAI(FM), New York, New York, at 2:00 p.m. in the afternoon was indecent within the meaning of Section 1464.[5] In so ruling, the Commission defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience."[6] The Commission said that the concept of indecency is intimately connected with the exposure of children to material that most parents regard as

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notice as to the new enforcement standards set forth in these cases. *Public Notice*, FCC 87-153 (released April 29, 1987), 2 FCC Rcd 2726 (1987). Petitioning and commenting parties here limit themselves to the broadcast-related rulings, and we do the same.

[4] 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D).

[5] *Pacifica Foundation*, 56 FCC 2d 94 (1975) (*WBAI(FM)*).

[6] *Id.* at 98. In our recent actions, we treated the nature of the material involved and the time of day that children are in the audience separately because we believe that the question of the time of a "patently offensive" broadcast is more pertinent to channeling and to whether a broadcast is "actionable" under 18 U.S.C. § 1464 than to whether it is indecent. We note, however, that because the aim of broadcast indecency regulation is to protect children, a violation finding will only be entered if both components of the test are met—*i.e.* material must be both indecent and broadcast when there is a reasonable risk that children may be in the audience.

inappropriate for them to hear.[7] Analogizing to the law of nuisance, the Commission said such material is inappropriate for broadcast when there is a reasonable risk that children may be in the audience.[8] The Commission suggested that this risk might not exist during late evening hours and that indecent programs could conceivably be broadcast at such times, if accompanied by appropriate warnings.[9]

3. The Supreme Court upheld the Commission.[10] The Court observed that the ease with which children may obtain access to broadcast material, coupled with the government's interest in protecting the well-being of its youth, and parents claim to authority in their homes, amply justify the channeling of indecent broadcasts. Thus, stressing the Commission's nuisance theory, the Court concluded that the FCC may, consistent with the first amendment, require broadcasters to channel indecent speech to times of day

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[7] *See id.*

[8] The Commission distinguished indecency from obscenity, noting that the latter is governed by the standards set forth in *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* test, obscene material is that which: (1) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; (2) depicts or describes in a patently offensive way sexual conduct; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24. *See generally WBAI (FM)*, 56 FCC 2d at 97-98. Recently, the Supreme Court further elaborated on the third criterion by holding that the determination of whether material lacks serious literary, artistic, political or scientific value should be made on the basis of a "reasonable person" standard, not a "contemporary community" standard. *Pope v. Illinois*, 107 S.Ct. 1918 (1987).

[9] *See WBAI (FM)*, 56 FCC 2d at 100.

[10] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

when there is not a reasonable risk that children may be in the audience.[11]

4. In cases decided subsequent to the Supreme Court's ruling, the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts.[12] Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975.[13] Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue. Also widely shared was the view that such broadcasts would be actionable only if aired before 10:00 p.m.[14] As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

5. Our April 1987 rulings in the three cases required us to readdress the subject thoroughly at the

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[11] *Id.* at 748-50; *see id.* at 757-59 (Powell, J., concurring). The Court also noted that the Commission relied on spectrum scarcity of the broadcast medium to provide additional support for such a requirement. The Court did not rely on that rationale, however, in upholding the Commission. *Id.* at 747-750; *see id.* at 758-761 (Powell, J., concurring). Our April 1987 rulings expressly rejected this rationale (*see, e. g., KPFK-FM*, 2 FCC Rcd at 2699 ¶ 15), and we do not rely on it herein.

[12] *See WGBH Educational Foundation*, 69 FCC 2d 1250, 1254-55 (1978); *Pacifica Foundation (WPFW-FM)*, 95 FCC 2d 750 (1983).

[13] *See KPFK-FM*, 2 FCC Rcd at 2699 ¶ 12.

[14] *Id.* at 2699 ¶ 16, 2701 ¶ 25 & cases cited therein.

full Commission level for the first time since the Supreme Court's 1978 decision. On close analysis we found that the highly restricted enforcement standard employed after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464. Essentially, we concluded that, although enforcement was clearly easier under the former standard, it could lead to anamolous results that could not be justified. Under that standard, material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue—and, consequently, of concern with respect to its exposure to children—would have been permissible to broadcast simply because it avoided certain words. That approach, in essence, ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency. This made neither legal nor policy sense. Accordingly, we concluded that we must take the more difficult approach to enforcing Section 1464. Therefore, each of our rulings advised broadcasters that in judging indecency complaints, we shall use the generic definition of indecency articulated by the Commission in 1975 and approved by the Supreme Court in 1978 as applied to the Carlin monologue. In applying that definition to the three cases before us in April, we recognized the importance of context to indecency determinations, noting that such determinations cannot be made in the abstract. Instead, we determined, based on the facts of each case, that the broadcasts at issue—or certain portions thereof—were indecent.[15] We also found that, at least with

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[15] *KPFK-FM* involved two complaints against the same licensee. While we found that the broadcast of certain por-

respect to the particular markets involved, available evidence suggested there were still significant numbers of children in the audience at 10:00 p.m. We therefore advised that broadcasters should no longer assume that 10:00 p.m. is automatically the time after which indecent broadcasts may safely be aired. Rather, we indicated that indecent material would be actionable (that is, would be held in violation of 18 U.S.C. § 1464), if broadcast when there is a reasonable risk that children may be in the audience, a determination that was to be based on ratings data on a market-by-market basis.

6. In sum, in each of the cases before us, we found that the licensee had broadcast indecent material on the particular programs in question, at a time when there was a reasonable risk of children in the audience. We declined to take enforcement action, however, because each broadcaster had proffered a reasonable basis for believing it was permissible to air the subject material under the circumstances involved. Therefore, we limited ourselves to warning the licensees that the broadcasts would be actionable under the revised enforcement standards made clear in our decisions.

II. THE PLEADINGS

7. Petitioner NAB asks the Commission to clarify, and petitioner ACT asks us to reconsider, not our rulings themselves, but the rulings as characterized

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tions of a program entitled "IMRU", which was the subject of one complaint, was actionable under Section 1464, we declined to find that a broadcast of another program, entitled "Shocktime, U.S.A.," was actionable. The complaint relating to the latter broadcast, which indicated that the broadcast consisted of unscripted, isolated expletives, did not present sufficient evidence for a finding of actionable indecency. *Id.* at 2700 ¶¶ 17-18.

in the public notice summarizing the cases. Petitioners do not challenge the Commission's authority to channel indecent broadcasts to late night hours. Instead, they maintain that our construction of Section 1464 is unconstitutionally vague and overbroad. To remedy these asserted constitutional failings, petitioners ask us to adopt several revisions. Collectively, they urge us to: (1) provide more precise guidance as to the elements pertinent to whether material is "patently offensive and violates "contemporary community standards for the broadcast medium"; (2) consider the literary, artistic, political and scientific value of programming in judging whether it is patently offensive and, thus, indecent; (3) exempt news and informational programming from a finding of indecency; (4) defer to reasonable good faith judgments made by licensees applying the requirements set forth by the Commission; (5) apply rulings prospectively, not sanctioning licensees until they have notice that particular material has been judged to be indecent; and (6) adopt a fixed time of day after which non-obscene, adult oriented programming may be aired, or articulate a similar "bright line test."[16]

8. In contrast, MIM argues in its comments that the Commission has not gone far enough in its regulation of indecency. MIM asserts that indecent material cannot be aired by a broadcaster at any time because the prohibition set out in 18 U.S.C. § 1464 is, on its face, absolute and unqualified. MIM also suggests that the present definition of indecency be expanded to encompass a wide range of material, including that which is "more than indelicate and less than immodest." MIM generally urges the Commission to reject the positions advanced by petitioners.

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[16] MDCD supports the position espoused by NAB.

III. DISCUSSION

9. As the Supreme Court has stressed, pronouncements about broadcast indecency should be confined to specific factual settings because of the crucial role of context to the issue.[17] For this reason, we decline to address at length the generalized contentions of the parties. To dispel apparent uncertainty about the scope and effect of our recent rulings, however, we will briefly review the applicable standards and the points raised to the extent they bear on the three cases before us.[18]

10. As a threshold matter, we acknowledge the difficulty and the sensitivity of the task at hand. Provocative programming will inevitably offend some

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[17] *FCC v. Pacifica Foundation*, 438 U.S. at 742.

[18] The public notice was not intended to have any independent legal significance but rather was issued simply to apprise all affected licensees of the change of enforcement standards that was reflected in our declaratory rulings. Thus, unlike the three rulings, the public notice is not a final action as to which reconsideration lies. *See* 47 C.F.R. § 1.106 (a) (1). Nonetheless, the three rulings could have an impact on all licensees (*see KPFK-FM*, 2 FCC Rcd at 2702 n.9; *KCSB-FM*, 2 FCC Rcd at 2704 n.11; *WYSP(FM)*, 2 FCC Rcd at 2707 n.15). Accordingly, to address uncertainty created by those rulings we treat the filings before us as requests for reconsideration of the three specific cases. *See* 5 U.S.C. § 554(e). The specific facts and circumstances of the three cases are key because the Commission was not attempting to set forth a blueprint as to all matter that would be considered indecent. Rather, as described below, all the Commission found was that the three specific programs before it—or, more specifically, portions thereof—were indecent. The fact that these conclusions were based on revised enforcement standards, which were announced through these decisions, does not change the fact that our rulings were confined to the specific factual settings of each case.

listeners or viewers, but we must always be mindful of the first amendment limitations on the government's ability to regulate the content of speech. The consistent and long-held policy under the Communications Act has been to preserve radio and television as media of free speech and free expression. By law, however, the Commission is duty-bound to enforce the restrictions on indecent radio transmissions.[19] And, of course, we must do so consistent with constitutional requirements. Our task is to harmonize these responsibilities with due regard for the competing interests involved.

11. We begin our consideration of petitioners requests as we began our 1975 *Pacifica* ruling, by stating: "In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what." [20] In exercising its authority to enforce the prohibition against indecency expressed in Section 1464, the Commission is advancing the government interest in safeguarding children from patently offensive descriptions or depictions of sexual or excretory activities or organs, so as to enable parents to decide effectively what material of this kind their children will see or hear.[21] The United States Court

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[19] *See* 18 U.S.C. § 1464; 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D).

[20] *WBAI (FM)*, 56 FCC 2d at 98.

[21] *See FCC v. Pacifica Foundation*, 438 U.S. at 749-50; *id.* at 757-58 (Powell, J., concurring). *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding New York state law prohibiting sale of offensive sexual material that is obscene as to children). In *Ginsberg*, the Court emphatically stated that "constitutional interpretation has consistently recognized that the parents claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. *Id.* at 639. Our goal is to ensure that parents

of Appeals for the Second Circuit has held that this "interest in protecting children from salacious material is no doubt quite compelling." [22]

12. MIM urges us to apply Section 1464 in a manner that would prohibit at all times of the day the broadcast of certain sexually explicit, yet non-obscene material. When the Supreme Court affirmed the Commission's *Pacifica* ruling in 1978, however, it made plain that our authority under Section 1464 is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material.[23] It is clear that our application of Section 1464 must be consistent with the constitutional principles derived from the *Pacifica* decision. Thus, under Section 1464, we may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults

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remain in a position to exercise this authority. We agree with the Court, however, that parental control cannot always be provided, particularly in this day of "walkman" radios and "watchman" televisions. As the Court explained in *Ginsberg*:

> While the supervision of children's reading may best be left to their parents, *the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify the reasonable regulation* of the sale of material to them.

[22] *Id.* at 640 (citation omitted, emphasis added). *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (1984), *citing Ginsberg v. New York*, 390 U.S. 629 (1968).

[23] See FCC v. Pacifica Foundation, 438 U.S. at 757-61 (Powell, J., concurring); id. at 748-50.

who are interested in seeing or hearing such material.[24] The unqualified reading of Section 1464 pressed by MIM, under which the broadcast of indecent material would be prohibited altogether would, we believe, run afoul of this constitutional premise.[25] With this brief preface, we turn to petitioners' arguments, which we evaluate in the context of our three rulings in April.

Patent Offensiveness and the Role of Merit

13. Petitioners seek further clarification of the term "patently offensive," as that term is used in the definition of indecency. Specifically, petitioners inquire as to the relevance of a work's serious literary,

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[24] KPFK-FM, 2 FCC Rcd at 2699 ¶¶ 14-15 & cases cited therein. Cf. Butler v. Michigan, 352 U.S. 380 (1956) (the government, in an effort to protect children, may not impose overly broad restrictions that would reduce adults to reading only that which is fit for children). See also WBAI(FM), 56 FCC 2d at 103-04 (concurring statement of Comm'rs Robinson and Hooks) (Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid 'indecent' language over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of government restraint in matters of public decorum).

[25] Many of these same considerations persuade us likewise that we must decline the expansive reading MIM would have us place on the term "indecent" i.e., as including that which is "immodest," "unbecoming," "unfit to be seen or heard," and "more than indelicate and less than immodest." The Supreme Court's *Pacifica* decision did not give the Commission authority to regulate any programming that might be objectionable to some members of the audience. Rather, the Court only approved our application of a standard addressing material containing patently offensive references to sexual or excretory activities or organs.

artistic, political or scientific value (*i.e.*, serious merit) in determining whether particular material is patently offensive and, thereby, indecent.

14. "Patently offensive" is a phrase that must, of necessity, be construed with reference to specific facts. We cannot and will not attempt to provide petitioners with a comprehensive index or thesaurus of indecent words or pictoral depictions that will be considered patently offensive. There is no way to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context. All we hold here, therefore, is that, in the three cases before us, we properly found the material identified as indecent to be patently offensive.

15. Our approach here is consistent with that of the courts, which have likewise never attempted to identify with the degree of certainty requested by petitioners the complete and definitive range of material that fall within the generic, legal definitions of certain categories of speech. We note, for example, that the phrase "patently offensive" is also used in the obscenity context and that the courts insist on construing that phrase with reference to specific facts, thereby developing its meaning on a case-by-case basis.[26] The fact that its meaning can only be given greater specificity on a case-by-case basis does not make the term "patently offensive" unconstitutionally vague in the indecency context any

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[26] *See generally New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *Smith v. United States*, 431 U.S. 291 (1977); *Ward v. Illinois*, 431 U.S. 767 (1977); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert denied*, 471 U.S. 1025 (1985).

more than it does in the obscenity context.[27] Broadcasters, when judging whether certain material is legally indecent, must exercise the same kind of judgment that they are obligated to exercise when judging whether certain material is legally obscene. They must apply a generic definition with reference to the guidance provided by existing case law on the matter. Broadcasters may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.

16. As we stated in our April rulings, and as we re-emphasize today, the question of whether material is patently offensive requires careful consideration of context.[28] The Supreme Court has said that the term "context" encompasses a "host of variables." [29] These variables, whose interplay will vary depending on the facts presented, include, as the Court noted, an examination of the actual words or depictions in context to see if they are, for example, "vulgar" or

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[27] Cf. United States v. Various Articles of Obscene Merchandise, 600 F.2d 394, 403-06 (2d Cir. 1979) (noting lack of precision in the term "patently offensive" as construed in obscenity cases).

[28] Contrary to what the April 29, 1987, Public Notice may have inadvertently suggested, consideration of context is critical in all indecency cases, regardless of whether the material in question involves innuendo, double entendre, or explicit references to sexual or excretory matters. As noted above, in light of the importance of context to the task at hand, we cannot list any particular language or material that will always be found indecent. Indecency, however, is a limited category of speech, and we would expect that the vast majority of programs broadcast will be unaffected by these three rulings.

[29] *FCC v. Pacifica Foundation*, 438 U.S. at 750.

"shocking,"[30] a review of the manner in which the language or depictions are portrayed,[31] an analysis of whether allegedly offensive material is isolated or fleeting,[32] a consideration of the ability of the medium of expression to separate adults from children,[33] and a determination of the presence of children in the audience.

17. The merit of a work is also one of the many variables that make up a work's "context," as the Court implicitly recognized in *Pacifica* when it contrasted the Carlin monologue to Elizabethan comedies and works of Chaucer.[34] But merit is simply one of many variables, and it would give this particular variable undue importance if we were to single it out

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[30] *See id.* at 747 (Stevens, J.); *id.* at 757 (Powell, J., concurring).

[31] As Justice Stevens noted in *Pacifica*, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communications. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18. As we did in 1976, when the Radio-Television News Directors Association made a similar request, we decline to rule on petitioners' request that we exempt all news broadcasts from indecency findings, because that issue is not directly presented by any of the cases before us. *See Citizen's Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976). We repeat, however, that context will always be critical to an indecency determination and that the context of a *bona fide* news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern.

[32] *FCC v. Pacifica Foundation*, 438 U.S. at 750.

[33] *See generally id.* at 758-59 (Powell, J., concurring).

[34] *Id.* at 750 & n.29.

for greater weight or attention than we give other variables. We decline to do so in deciding the three cases before us. We must, therefore, reject an approach that would hold that if a work has merit, it is *per se* not indecent.[35] At the same time, we must reject the notion that a work's "context" can be reviewed in a manner that artificially excludes merit from the host of variables that ordinarily comprise context.[36] The ultimate determinative factor in our analysis, however, is whether the material, when examined in context, is patently offensive. In the three cases before us, we reaffirm our prior rulings answering this question in the affirmative.

18. The material that the Commission identified in the *KPFK-FM* case as indecent occurred in the context of a 10:00 p.m. radio broadcast of excerpted portions of a theatrical play. The excerpted portions that were broadcast contained the concentrated and repeated use of vulgar and shocking language to portray graphic and lewd depictions of excretion, anal

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[35] We note, however, that even if we were to consider merit as a separate factor, for example if we were to apply a variable obscenity test, *see Ginsberg v. New York*, 390 U.S. 629 (1968), our determination in each of the three cases would be unaltered. Indeed, even if we were to consider prurient appeal as an additional, separate factor, our conclusions would not change. We conclude that the descriptions of sexual conduct in each of the three broadcasts described herein would appeal, in particular, to the prurient interest of children.

[36] We do not construe our *1975 WBAI(FM)* ruling as inconsistent with this notion. *WBAI(FM)*, 56 FCC 2d at 98. Rather, we interpret our prior ruling to mean that we would not permit merit to "save" programming that is nonetheless patently offensive. We likewise reject in our decisions today the notion that merit is a separate prong of the test for indecency.

intercourse, ejaculation, masturbation, and oral-genital sex.[37] Despite Pacifica's claim that very few children ordinarily listen to KPFK-FM at 10:00 p.m., we nevertheless determined, on the basis of available data for that market, that there was a reasonable risk that children may have been in the radio audience at the time of the broadcast. We also believe that many of those children who may have listened to the subject broadcast would have readily understood the discussion, as would other children who may have randomly tuned in. Once having tuned in, they may have continued to listen because the references were more than fleeting or isolated.

19. The material described sexual and excretory activities and organs in a manner that was patently offensive according to contemporary community standards for the broadcast medium. Indeed, we find it hard to imagine the broadcast for sexually-related language in a more patently offensive manner than in the excerpts highlighted in our *KPFK-FM* ruling. The fact that the material presented was excerpted from a dramatic performance that dealt with homosexual relations and Acquired Immune Deficiency Syndrome (AIDS) does not affect our determination that the *manner* in which these subjects were dealt with in the excerpts was patently offensive. Nor does Pacifica's claim that the play from which the excerpts were taken has been critically acclaimed and long-running in Los Angeles area theaters change the determination. We do not dispute the public value of programming addressing the serious problems posed by AIDS or its effect on the homosexual community.

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[37] Excerpted portions of the broadcast appear in the Appendix to this decision.

We emphasize that subject matter alone does not render material indecent. Only when that material is presented in a *manner* that is patently offensive will it be considered indecent. In *KPFK-FM*, we simply found that the excerpted materials, considered in context, were patently offensive; and we held that when such material is broadcast in such a manner and at a time when there is a reasonable risk that children may be in the audience, then that broadcast will constitute actionable indecency within the meaning of Section 1464.

20. For similar reasons, we found that morning broadcasts of portions of the Howard Stern show constituted actionable indecency. The relevant material at issue in the *WYSP FM*) ruling occurred in varying contexts: it was presented, at times, as part of discussions among Howard Stern and his fellow broadcast personalities, as part of call-in conversations between members of Mr. Stern's audience and broadcast personnel, and as part of situation comedy routines staged by the members of the broadcast team. All of the excerpted material, however, consisted of vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of what we described, and to which has not been disputed, as "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." [38] Furthermore, all of the material was presented on the radio at times when significant numbers of children were in the listening audience, during the 6:00 a.m.-

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[38] *WYSP(FM)*, 2 FCC Rcd at 2706 6 10. Excerpts of the broadcasts are reprinted in the Appendix.

10:00 a.m. Howard Stern show. Further, although we agreed that much of the programming involved innuendo and double entendre—that is, it was oblique or susceptible to varying interpretations—and therefore did not constitute indecency, we also determined that the sexual import of certain references in the material was inescapable and understandable given the surrounding context of the discussion. In short, it was not merely sexual innuendo or double entendre, despite Infinity's assertions to the contrary. Additionally, the fact that the programs under examination did not contain merely an occasional off-color reference or expletive, but instead dwelt on sexual and excretory matters in a pandering and titillating fashion indicated that children who may have randomly tuned into them would have likely continued to listen.

21. Given this context, the Commission determined that portions of the broadcasts contained material that was presented in a manner that was patently offensive according to contemporary community standards for the broadcast medium. Although different from the programming at issue in *KPFK-AM*, the sexual references excerpted in our *WYSP (FM)* ruling shared their same patently offensive character. Nothing about the context changed this determination.

22. Finally, the song lyrics in *KCSB-FM* were indecent for similar considerations.[39] The material at issue in that case was presented in the context of a musical recording broadcast at a time of day when the Commission determined that there was a reasonable risk that children may have been in the radio audience. The material contained both lewd references to the male genitals and lewd descriptions of

[39] The lyrics are reprinted in the Appendix.

intercourse and oral-genital sex. The lyrics, like the programming at issue in the other cases before us, graphically portrayed these sexual organs and activities in a manner that was patently offensive.

23. Furthermore, the explicitness of some of the lyrics rendered any purported innuendo or double entendre in the remainder of the song clear and capable of a specific, sexual meaning. The lyrics were intelligible, and their meaning could have been clearly understood by children who may have been in the listening audience. The fact that the material occurred in the context of a musical recording did not mitigate the patently offensive manner in which that material was presented. Therefore, we determined that the broadcast constituted actionable indecency.

Contemporary Community Standards for the Broadcast Medium

24. Petitioners also ask for clarification of the phrase "contemporary community standards for the broadcast medium," as that term is used in the indecency definition and was used in each of our three April rulings. We clarify that the Commission used the term "contemporary community standards" in a manner analogous to the definition set forth in the Supreme Court's decision in *Hamlin v. United States*.[40] In that case, the Court explained that the purpose of "contemporary community standards was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.[41] Rather, decisionmakers are to draw on their views of the average person in the community.

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[40] 418 U.S. 87 (1974).

[41] *Id.* at 107.

The Court also noted that, by referring to contemporary community standards in *Miller*, it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating material.[42] Hence, in a Commission proceeding for indecency, in which the Commission applies a concept of "contemporary community standards for the broadcast medium," indecency will be judged by the standard of an average broadcast viewer or listener. Thus, we determined in each of the three cases before us that an average listener would find material patently offensive. In making the required determination of indecency, Commissioners draw on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters. The determination reached is thus not one based on a local standard, but one based on a broader standard for broadcasting generally.

The Role of Reasonable Licensee Judgments

25. Petitioner ACT urges us to defer to reasonable, good faith judgments of licensees in deciding whether a licensee has violated Section 1464. In this way, ACT contends, we will help to avoid inhibiting programming decisions and intruding into the broadcast editorial process. In a related vein, petitioner NAB advocates a policy under which Commission rulings would have prospective effect only. Under this approach, the Commission would refine its standards of what is indecent on a case-by-case basis, but would not penalize a licensee for a broadcast unless the licensee had specific notice that the Commission or a court had previously found that broadcast to be indecent. Absent a ruling squarely on point, a licensee's

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[42] *Id.* at 104-05.

decision to air programming would be considered reasonable and automatically beyond the reach of Section 1464 under this scenario.

26. ACT does not contend that deference to reasonable licensee judgments in interpreting Section 1464 is required as a matter of law, and we find no basis on the record before us to allow such judgments to preclude a finding that a licensee has violated its statutory duties. Indeed, given the variety of programming aired by licensees, such a policy would largely read the prohibition against indecent transmissions out of Section 1464. Congress cannot have intended such a result, and we find no basis for reading such a provision into the statute. Although we acknowledge that the statute requires a broadcaster to make judgments as to whether certain material would violate the statute, the fact that the decision may not always be an easy one cannot excuse the broadcaster from having to exercise its judgment, any more than it can excuse the Commission from exercising its enforcement responsibilities. We note, however, that it is standard procedure for the Commission, in deciding whether to impose a sanction for violation of the law and, if so, what those sanctions should be, to give weight to the reasonable determinations of licensees endeavoring to comply with the law.[43] Because licensees demonstrating reasonable judgment have no cause to fear the imposition of

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[43] *Cf. Taft Broadcasting Co.*, 16 RR 2d 507, 511 (1969) (although broadcaster violated lottery statute, staff-imposed sanctions rescinded because there were no prior decisions that would have enabled licensee reasonably to anticipate FCC's construction of 18 U.S.C. § 1304). *See generally* 47 U.S.C. § 503(b)(2) (in assessing a forfeiture, Commission directed to take all relevant circumstances into account).

unjustified sanctions,[44] we reject the petitioners' contentions that the editorial decisions of broadcasters will be inappropriately chilled by continuation of this approach.[45]

27. We used precisely this approach in the cases before us. Although we did not consider the licensees reasonableness in concluding that the material was indecent, pivotal to our decision not to impose sanctions was the fact that each licensee demonstrated a reasonable basis to believe, based on prior Commission and staff rulings, that the programming under review was permissible to broadcast. For example, in each case, we weighed favorably the licensee's reasonable belief that only repetitive use of the expletives at issue in the 1975 *Pacifica* case would be found indecent, and the fact that none of these cases involved

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[44] *See generally National Ass'n of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (D.C.Cir. 1975), wherein the Court of Appeals observed that "[t]here is no reason for a licensee who is not out to cut corners to fear that severe sanctions will be imposed for good faith error." *Id.* at 450.

[45] Obviously, to the extent a broadcaster is "chilled" from airing indecent programs when there is a reasonable risk that children may be in the audience, that is not an "inappropriate chill." We emphasize, moreover, that we do not define reasonable in the manner that NAB appears to urge—that is, we do not adopt a policy under which a licensee's broadcast of patently offensive sexual or excretory references or depictions would be found reasonable, and hence not a violation of Section 1464, unless the licensee has notice beforehand in the form of explicit Commission precedent that the program is indecent.

Unquestionably, however, it would be *prima facie* unreasonable for any licensee to air material that has already been found indecent when there is a reasonable risk that children may be in the audience.

repetitive expletives in a manner closely resembling the "Filthy Words" monologue.[46] Moreover, in *WYSP (FM)*, Infinity Broadcasting's added reliance on staff rulings addressing analogous broadcasts, some of which involved Infinity, further buttressed our decision not to take action against the licensee. Finally, in *KCSB-FM* and *KPFK-FM*, the fact that the licencees aired broadcasts containing indecent utterances after 10:00 p.m. gave added weight to our decision not to sanction the licensees, in view of previous Commission rulings suggesting that it might be permissible to do so after that time.[47] For all these reasons,

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[46] Infinity Broadcasting noted, for instance, that its employment contract with Mr. Stern expressly precludes his use of the seven words at issue in the 1975 *Pacifica* case during his broadcast program.

[47] Petitioners have asked that we establish some hour, specifically 10:00 m., after which certain non-obscene, adult oriented programming may be aired. We note, first, that the Commission's holding in adjudicatory matters can resolve only the issues before it. In two of these proceedings, we have found that there remains a reasonable risk that children may be in the audience at 10:00 p.m. and, therefore, that 10:00 p.m. can no longer be considered the hour after which indecent programming may be aired. Nonetheless, we will avail ourselves of this opportunity to express more generally our current intention with respect to this issue based upon information currently available to the Commission.

Although we remain convinced that a determination in individual cases based on relevant data is theoretically the most desirable means of determining when there is no longer a reasonable risk that children may be in the audience, we are constrained to agree with petitioners that the effect of that approach may well be to cause broadcasters to forego the broadcast of certain protected speech altogether, rather than to channel it to late night hours. The result—an effective ban—would be contrary to current law that indecent but not obscene material can be restricted but not banned. See FCC

rather than imposing a sanction, we simply warned each licensee, as well as broadcasters generally, that our enforcement standards have changed and that these broadcasts would be actionable under the new standards.[48]

III. CONCLUSION

28. Nothing said herein changes the outcome in any of the decisions in question. The Commission, therefore, reaffirms each of the above-captioned rul-

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v. Pacifica Foundation, 438 U.S. at 757-61 (Powell, J., concurring); id. at 748-50.

Therefore, whereas previously we indicated that 10:00 p.m. was a reasonable delineation point, we now indicate that 12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience. Indeed, parents will be on notice that their supervision of any children still awake must be increased after midnight. This approach, we believe, accommodates the competing interests of (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene. We emphasize, however, that obscene programming is not protected by the first amendment and that, under Section 1464, it is prohibited from being broadcast at any time of the day or night.

[48] Obviously, in cases where we do not impose a sanction, as here, the conduct at issue cannot be a basis for adverse action at renewal time.

ings. In each case, we reviewed a tape recording of the programming involved to determine whether the context was such that the licensee had aired sexual or excretory material in a manner that was patently offensive as measured by contemporary community standards for the broadcast medium.[49] Because we found that each had aired such material in a manner that was patently offensive according to contemporary community standards for the broadcast medium, we determined that each had broadcast indecent material. We emphasize the narrowness of our holdings in that they are limited to the specific broadcasts at issue. We hold simply that the broadcasts here, illustrative portions of which are attached hereto in the Appendix, meet the definition of indecency affirmed by the Supreme Court in *Pacifica*.

29. Furthermore, these indecent broadcasts were aired when there was a reasonable risk that children may have been in the audience. Accordingly, they were broadcast in violation of Section 1464. We also reaffirm our conclusion in April that prior rulings could have led the licensees reasonably to conclude that the broadcasts were permissible. Thus, while we warned these and other licensees that the programs were, in fact, indecent and must be channeled, and even then preceded and accompanied by appropriate

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[49] To conserve our resources, we will ordinarily require complaining parties to provide a tape, transcript or significant excerpts of programming, together with the date and time of the subject broadcasts, and the call letters of or other identifying information about the broadcast station and licensee. In this way, we will have a sufficient basis for identifying prima facie violations of the statute before requiring broadcasters to respond to complaints. In addition, to facilitate prompt determinations, complaints should be lodged as soon as possible after a broadcast, as in the cases before us; they should not be withheld until renewal time.

warnings, we did not and do not impose any sanctions upon these licensees.

30. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed June 1, 1987 by Action for Children's Television, *et al.*, and the Petition for Clarification, filed June 1, 1987 by the National Association of Broadcasters, ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

I. Excerpts from August 31, 1986, 10:00 p.m. "IMRU" broadcast; Pacifica Foundation, KPFK-FM, Los Angeles, California:

"Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking.

"I'll give you the gentlest fuck west of the Mississippi.

"We cuddled and played around a bit before he started working on my ass.

"I remember he was kneeling between my legs and he worked my asshole with lube for the longest time—just gettin it to relax so there was no tension, no fear.

"He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain.

"His cock felt warm inside me—and full—so nice and full. So he began sliding his cock back and forth inside of my ass—but so gently, so gently.

"I don't think I've ever had such a gentle, sensitive fuck before or after.

Well, he must have gone at it for twenty minutes at the very least, just slidin his cock back and forth inside of my ass.

"And then he whispered to me, "You're gonna feel me come inside of you. And I did. Man, I could feel the cum pulse up his shaft inside my ass. I could count the pulses and it felt warm and good.

Actor 1: "You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex, you understand?

Actor 2: "Yeah!

1: None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?

2: "Hot throbbing cocks, hard pounding muscles.

1: "You've got it.

II. Excerpts from various weekday 6:00-10:00 a.m." Howard Stern Show broadcasts; Infinity Corporation, WYSP (FM), Philadelphia, Pennsylvania:

Excerpt 1

Howard Stern: "God, my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey.

Ray: "Use them like Bocci balls.

Excerpt 2

Howard Stern: "Let me tell you something, honey. Those homos you are with are all limp.

Ray: "Yeah. You've never even had a real man.

Howard Stern: "You've probably never been with a man with a full erection.

Excerpt 3 Susan: "No. I was in a park in New Rochelle, N.Y.

Howard Stern: "In a park in New Rochelle? On your knees?

Susan: "No, no.

Ray: "And squeezing someone's testicles, probably.

Excerpt 4

Talking to a caller

Howard Stern: "I'd ask you your penis size and stuff like that, but I really don't care.

Excerpt 5

As part of a discussion of lesbians

Howard Stern: "I mean to go around porking other girls with vibrating rubber products and they want the whole world to come to a standstill.

Excerpt 6

Howard Stern: "Have you ever had sex with an animal?

Caller: "No.

Howard Stern: "Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds.

Howard Stern: "Baaaaah. That's where I was thinking that Sherri Lewis, instead of like sodomizing all the people at the Academy to get the shot on the Emmys she could have had Lambchop do it.

III. Excerpt from July 26, 1986, 10:00 p.m. (approximate) broadcast of "MakinBacon"; The Regents of the University of California, KCSB-FM, Santa Barbara, California:

Makin' bacon, makin' bacon, makin' bacon, makin' bacon! (Inaudible)

A ten-inch cropper with a varicose vein!
Makin' bacon is on my mind

Come here baby, make it quick
Kneel down there and suck my dick
Makin bacon is on my mind
Makin bacon is on my mind

Turn around baby let me take you from behind
Making bacon is on my mind

With your blue, blue knickers, you look so neat
Bend over baby, gonna give you my meat
Makin bacon is on my mind

Get down baby on your hands and knees
Take my danish and give it a squeeze
Makin bacon is on my mind
Makin bacon is on my mind

Turn around baby let me take you from behind
Makin bacon is on my mind

* * *

Hey baby, got something to chew
Deep throat, baby, it's good for you
Makin bacon is on my mind

* * *

Makin bacon is on my mind

Turn around baby, let me take you from behind
Makin bacon is on my mind

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

I agree with the majority that the programs at issue in these three cases are indecent. Broadcast of the programs violated Section 1464 of Title 18 of the United States Code.

I write separately because the majority decision fails to state a satisfactory reason for not issuing a rule to inform broadcasters when they may channel the broadcast of indecent, non-obscene programs. Footnote 47 begins: "Petitioners have asked that we establish some hour, specifically 10:00 p.m., after which certain non-obscene, adult oriented programming may be aired." The majority appropriately states that "the Commission's holding in adjudicatory matters can resolve only the issues before it." Because of the holding implicit in two of these cases, the majority points out, "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired." But this is no answer.

If we were not taking a position on the petitioners request to establish some hour in these proceedings, we should have proposed a rulemaking. We could have taken official notice that the broadcasting industry and, indeed, the public generally, took an active interest in these adjudicatory matters. The Commission's action on these petitions, as important as it is to the parties, is of even greater interest because of what it says about our policy on the regulation of indecent speech. At stake are important Constitutional issues and equally important societal values. Indecent speech is protected by the First Amendment. On the other hand, the compelling government interest in protecting the welfare of children obligates us to

channel the time, place, and manner of indecent speech so there is no reasonable risk that children may be in the audience. Yet, to avoid chilling broadcasters speech by subjecting them to a vague or overbroad standard, we must be as specific as possible in describing how such speech should be channelled. The least we could have done was to establish a time certain after which indecent material may be channelled.

This the majority does not do. After stating why an adjudicatory matter is not the vehicle for defining the critical hour after which indecent material may be broadcast, they discuss the merits of adopting a 12:00 midnight hour. However, not only is this dicta, it is neither decisive nor clear. Footnote 47 refers to the majority's expression of its' current intention . . . based upon information currently available to the Commission and its "current thinking." The reader is left to wonder what "information currently" the Commission has. How exactly this information factored into the majority's "current thinking" is unexplained. Nothing informs the broad casters or parents of children what to expect from a fully informed Commission or what to present to the Commission so that we will be so informed.

Moreover, the arguments the majority gives in support of midnight as the critical hour may well be equally true if applied to an earlier hour. Footnote 47 states that it is reasonable to expect that, by midnight adults will generally be present and able to monitor the listening and viewing habits of the children in their homes. Based on "information currently available to the Commission" (or, at least, to this Commissioner), this is equally true at 11:00 p.m. The fact is the Commission has no scientific body of information that conclusively establishes one time as

more appropriate than another as the critical hour after which to permit broadcast of indecent speech. What is necessary is a notice of proposed rulemaking to establish a record. Even then, picking the right hour will be a judgment call. The Commission will have to evaluate and weigh the competing interests which the majority recognize: the government interest in protecting children from indecent material; the interest of parents to decide whether their children are exposed to such material; the broadcasters interest in airing such material in an appropriate time, place and manner; and the interest of adults in seeing and hearing programs inappropriate for children, but not obscene.

I would propose a Commission rule establishing the end of prime time as the appropriate time. In making this proposal, I am mindful of the Supreme Court's decision in *Butler v. Michigan*, 352 U.S. 380 (1956). Time, place and manner restrictions imposed to advance the government and societal interests in protecting the welfare of children under the *Butler* analysis cannot reduce adult programming to the level of what is fit only for children. Because the broadcasting industry and the public uniformly recognize prime time as the time of heaviest viewing, I believe that post-prime time (after 11:00 p.m. or 10:00 in certain areas of the country) is a more appropriate time to channel indecent programming. Yet, such channelling still affords adults reasonable access to such material.

Although the available data do not point to any one time, we are not wholly without guideposts in picking the critical hour. We know that the incidence of children in the broadcast audience decreases progressively in the late evening hours. Available

nationwide data on radio listening habits [1] for Monday-Friday show that the teen audience (ages 11-17) peaks at 10:00 p.m. then drops down to approximately the 9:00 p.m. listening level,[2] and drops dramatically from 11:00 p.m. to midnight.[3] The December 1986 Nielsen Service Survey for prime time viewing habits also demonstrates a significant decline in post-prime-time viewing by children and teens. The survey shows that while 31-34% of the total television time viewed by teens (12-17) was during prime-time hours [4] only 5-6% of their viewing occurred during the initial two post-prime-time hours (11:00 p.m.-1:00 a.m.). Children aged 6-11 spent 28% of their total television viewing time during prime time hours, and only 2% during the first two hours of post-prime time. Eighteen percent of the viewing time of children aged 2-5 occurred during prime-time hours, also dropping to 2% post-prime time.

Prime time is the traditionally acknowledged time of heavy viewership. Because Nielsen data show a significant decrease in teen and child viewing during post-prime-time hours, it seems reasonable to channel indecent programming to post-prime time. Nielsen data show that 9-12% of the total viewing time

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[1] Radar 33, Radio Usage, Spring 1986 Report at 6-9.

[2] From 10:00-11:00 p.m. the data show a decrease of approximately 500,000 listeners, or 14% of the 10:00 p.m. listening level.

[3] From 11:00-12:00 midnight the teen listening level decreases by approximately 1,200,000 listeners, or one-third of the 10:00 p.m. listening level.

[4] Prime time in this survey was 8:00-11:00 p.m. Monday-Saturday; 7:00-11:00 p.m. Sunday.

of the adult males surveyed and 8-10% of the viewing time of adult females occurred post-prime time. This demonstrates that adults *do* remain in the audience post-prime time. Channelling indecent programming to those hours should still provide reasonable access to adult viewers.

Admittedly, the foregoing statistics are not the most precise for our purposes, nor are conclusions readily drawn from them. Were we to issue an NPRM, I would hope commenters could supply better statistics; statisticians could then comment on the statistical significance of all the data.

In the meantime, based upon the data and my balancing of the competing interests, considering particularly the Court's instructions in *Butler*, I would propose to channel indecent speech to post-prime-time hours on Sunday through Thursday nights. I agree with the majority that indecent speech should be channelled after 12:00 midnight on Friday and Saturday nights. Both children and adults may well stay up later on those nights. Thus, channelling indecent programs to a slightly later hour on non-school nights promotes the government interest in protecting children while still providing reasonable access to such programming for adults.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Enforcement of Prohibitions Against Obscenity
and Indecency in 18 U.S.C. § 1464

ORDER

Adopted: December 19, 1988;
Released: December 21, 1988

By the Commission: Commissioner Dennis concurring and issuing a separate statement.

1. On October 1, 1988, the President signed into law Pub. L. No. 100-459, which contains appropriations for the Commission for fiscal year 1989.[1] This legislation also contains the following provision:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

2. In compliance with this law, we are adopting a new rule pursuant to which the Commission will enforce the provisions of Section 1464 of the United States Criminal Code on a twenty-four a day basis.

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[1] *Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459 (signed October 1, 1988).

3. Under previous interpretations of Section 1464, the Commission and the courts had applied this law to prohibit the broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children might be in the audience.[2] Initially, the Commission had suggested that this risk might be sufficiently diminished after 10 p.m. to permit broadcasts aired after that time.[3] In a 1987 ruling, however, the Commission stated that its current thinking was that such broadcasts would not be permissible until after 12:00 midnight.[4] Thereafter, the United States Court of Appeals for the District of Columbia remanded two Commission rulings concerning post-10 p.m. indecent broadcasts in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT*), for a further explanation justifying its "new, more restrictive channeling approach."[5] The court instructed the Commission to create a more complete and thorough record to support channeling prescriptions.[6] In order to comply with the explicit mandate of the recent

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[2] *See Pacifica Foundation*, 56 FCC 2d 94 (1975) (WBAI-FM), *aff'd*, *Pacifica Foundation*, 438 U.S. 726 (1978) *(Pacifica)*; *Pacifica Foundation Inc.*, 2 FCC Rcd 2698 (1987); *The Regents of the University of California*, 2 FCC Rcd 2703 (1987); and *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), order on *reconsideration*, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987) *(Reconsideration Order)*, *aff'd* in part and remanded in part *sub nom.*, *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (ACT).

[3] *WBAI-FM*, 56 FCC 2d at 98.

[4] *Reconsideration Order*, 3 FCC Rcd at 937 n.47.

[5] *ACT*, 852 F.2d at 1334. The court affirmed a Commission ruling that a morning broadcast violated Section 1464.

[6] *Id.*

legislation, however, we must now abandon our plans to initiate a proceeding in response to the concerns raised by the court's decision.

4. The directive of the appropriations language affords us no discretion. It directs us to exercise our authority under the Communications Act to enforce the restrictions of Section 1464 of the Criminal Code on a twenty-four hour a day basis.[7] Consequently, in accordance with this legislative mandate and pursuant to our authority under Title 47, we will now enforce the indecency restrictions of Section 1464 twenty-four hours a day under our new rule. In enforcing this rule, the Commission will continue to apply its generic definition of indecency, which has been upheld by the courts.[8] Under this definition, broadcast indecency is language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.[9]

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the Commission finds good cause for promulgating the rule herein without prior public notice and comment. Section 553(b)(3)(B) provides that an agency may promulgate a rule without notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public

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[7] The legislative history of H.R. 4782 also makes clear that Congress adopted the indecency amendment in order to eliminate any co-called safe harbor for the broadcast of indecent material. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (remarks of Sen. Helms).

[8] *See* Pacifica, 438 U.S. at 726; ACT, 852 F.2d at 1334.

[9] *Reconsideration Order*, 3 FCC Rcd at 930.

interest." 5 U.S.C. § 553(b)(3)(B). Because the recently enacted appropriations legislation mandates implementation of a twenty-four hour indecency ban, the Commission's task in promulgating the rule is purely ministerial and leaves no room for discretion. No purpose would thus be served by affording the public an opportunity to comment on this rule before its promulgation.

PAPERWORK REDUCTION ACT STATEMENT

The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

6. Authority for the action taken herein is contained in Sections 4(i), 303(r), 312(a)(6), 312(b), and 503(b)(1)(D) of the Communications Act of 1934, as amended, and Pub. L. No. 100-459 (signed October 1, 1988).

7. Accordingly, IT IS ORDERED that Part 73 of the Commission's Rules and Regulations is amended as described above and set forth in Appendix A below.

8. IT IS FURTHER ORDERED that pursuant to the Administrative Procedure Act, 5 U.S.C. Section 553(d)(1), the amendments to the Commission's Rules and Regulations shall become effective 30 days after publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Chapter I, Title 47, Part 73 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. §§ 154, 303, 312 and 503.

2. A new section 73.3999 is added to the Commission's Rules, which will read as follows:

Section 73.3999 Enforcement of 18 U.S.C. § 1464 (Restrictions on the transmission of obscene or indecent language)

> The Commission will enforce the provisions of Section 1464 of the United States Criminal Code, 18 U.S.C. § 1464 on a twenty-four hour per day basis in accordance with Public Law No. 100-459.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464.

I concur in the result, but I write separately to recognize the constitutional question this decision raises. The majority correctly concludes "[t]he directive of the appropriations language affords us no discretion . . ." in this matter. Nevertheless, I have serious doubts whether our new rule will pass constitutional muster.

The Supreme Court in *Pacifica Foundation* upheld the Commission's finding that an indecent monologue broadcast in the early afternoon constituted cause for granting a complaint against the station which had broadcast the monologue. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court however, emphasized that its ruling was narrow, and was based on "consideration of a host of variables. . ." (*id.* at 750), of which the first mentioned was the time of day of the brodcast. *Id.* at 750.

Recently the U.S. Court of Appeals for the District of Columbia struck down part of two Commission rulings regarding indecent broadcasts. The Court found that the Commission had not properly justified its choice of the hours midnight to 6 a.m. for the channeling of indecent speech. The Court directed the Commission to reopen its examination of the time limitation:

> . . . in a manner sensitive to these considerations: (1) the speech at issue . . . is protected by the first amendment; (2) the Commission's avowed

> objective is not to establish itself as a censor but to *assist parents* in controlling the material young children will hear." [emphais in original] *Action for Children's Television v. F.C.C.*, 852 F.2d 1332, 1334 (1988).

The Court held that:

> Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear. *Id.* at 1344.

Finally, the Court noted:

> Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed. 2d 319 (1980) . . . Here, *the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule.* *Id.* at 1343, n. 18. [emphasis added]

Both these rulings suggest that the courts would not uphold an outright ban on the broadcast of indecent speech. In the face of those decisions, I have grave misgivings about the constitutionality of the appropriations language. Our mandate from Congress, however, is unambiguous, and therefore I must support the action taken in this *Order*.

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MM Docket No. 89-494

In the Matter of ENFORCEMENT OF PROHIBITIONS AGAINST BROADCAST INDECENCY IN 18 U.S.C. § 1464

REPORT OF THE COMMISSION
(Proceeding Terminated)

Adopted: July 12, 1990; Released: August 6, 1990

By the Commission: Commissioner Quello concurring and issuing a statement.

TABLE OF CONTENTS

Subject	Paragraph
I. Introduction	1
II. Background	4
III. Discussion	10
A. Constitutional Standard	11
B. Governmental Interest	14
C. Operative Definitions	24
1. Definition of Indecency	24
2. Definition of Children	28
D. Narrowly Tailored Means	34
1. Accessibility to Children	34
2. Children's Listening and Viewing Habits	38
a. Radio	39
b. Television	50
c. Supervision	57
d. Conclusions	65
E. Alternatives to 24-Hour Prohibition	69
1. Time Channeling	70
2. Ratings and Warning Devices	76
3. Broadcast Technologies	80
F. Non-Broadcast Alternative Programming Sources	84
G. Enforcement	89
IV. Conclusion	91
V. Ordering Clauses	94

Appendix A: Parties Filing Formal Comments and Reply Comments

Appendix B: Examples of Commission Action

I. INTRODUCTION

1. In this report we respond to a remand of the record granted by the U.S. Court of Appeals for the District of Columbia in *Action for Children's Television v. FCC (ACT II)*.[1] In its remand order, the court directed the Commission to conduct a "full and fair hearing" on the constitutionality of a statutory provision[2] which requires the Commission to prohibit the broadcast of indecent material 24 hours a day.[3] The court granted the remand in light of the Supreme Court's recent decision in *Sable Communications of California, Inc. v. FCC (Sable)*,[4] which held that government may regulate indecent speech if the regulation promotes a "compelling" government interest and is "narrowly tailored" to serve that interest. The Commission accordingly issued a *Notice of Inquiry (NOI)*[5] to solicit public comment on issues relevant to

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[1] No. 88-1916 (D.C. Cir. Sept. 13, 1989).

[2] The Commission's 1989 appropriations law states: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

[3] Enforcement of the FCC regulation promulgating the 24-hour prohibition, codified at 47 C.F.R. § 73.3999 (1989), was stayed pending judicial review by the court in *ACT II*.

[4] 109 S. Ct. 2829 (1989).

[5] 4 FCC Rcd 8358 (1989).

analyzing the validity of the 24-hour indecent broadcasting prohibition in view of the *Sable* decision.[6]

2. After careful consideration of the responses to our inquiry, we conclude that a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in *Sable* for the regulation of constitutionally protected speech. First, the Supreme Court has expressly recognized the government's compelling interest in protecting children from broadcast indecency, both to facilitate parental supervision and to promote the well-being of children who may be exposed to indecent material. Moreover, the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast, rendering the government interest in protecting children even more compelling. Second, the record in this proceeding reveals that no alternative to a 24-hour prohibition on indecent broadcasts would effectively serve this government interest. The best available evidence indicates that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and night. Neither time channeling nor ratings and warning devices permit effective parental control over these activities, and technologies that may permit control are not cur-

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[6] We received over 92,500 formal and informal responses to our *NOI*. Almost 88,000 informal letters supported a 24-hour prohibition, while approximately 4,500 letters opposed it. Formal commenters are listed in Apendix A, and the informal comments have been placed in the docket file. American Family Association *et al.* (AFA) filed its reply comments one day late. In the interest of assembling a full and complete record, and the lack of prejudice resulting to any party, we will accept those comments.

rently available. On the other hand, indecent material similar to that broadcast is readily available on other media over which parents can exercise control. Accordingly, we conclude that the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

3. We recognize, however, that there may be instances in which children are not in the broadcast audience at a given time of day in a given market. We therefore have decided to modify our enforcement procedures to permit stations accused of airing indecent material to demonstrate that children in fact are not present in the broadcast audience in their market at the time the alleged indecent program was aired. We believe that, as thus enforced, the 24-hour prohibition against broadcast indecency clearly meets the narrowly tailored criteria applied by the Supreme Court in *Sable*.

II. BACKGROUND

4. This proceeding addresses Section 1464 of the Criminal Code, 18 U.S.C. § 1464 (1988), first enacted by the Radio Act of 1927, reenacted by the Communications Act of 1934, and later codified in the Criminal Code. Throughout this period of more than 60 years, Section 1464 and its identical precedessor provisions have prohibited the broadcast of indecent language. Since 1934, the Commission has been authorized by the Communications Act to enforce Section 1464's provisions by, among other things, assessing forfeitures for its violation.[7]

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[7] *See* 47 U.S.C. §§ 312(a)(6) and (b), 503(b)(1)(D) (1988).

5. In 1978, the Supreme Court affirmed the Commission's enforcement of Section 1464's prohibition on indecent broadcasting, including the Commission's definition of indecent language.[8] *F.C.C. v. Pacifica Foundation (Pacifica)*, 438 U.S. 726 (1978); *See also Action for Children's Television v. F.C.C.*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (*ACT I*). In *Pacifica*, the Court also reaffirmed its holding in *Ginsberg v. New York*[9] "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim of authority in their own household' justified regulation of otherwise protected expression." The Court found that these concerns, along with the broadcast media's uniquely pervasive presence and unique access to children, justified special treatment of the broadcast of indecent material. *Id.* at 748-749.

6. In *ACT I*, the D.C. Circuit Court affirmed the Commission's action in one case involving the daytime broadcast of indecent material, but remanded for further explanation two other cases involving broadcasts aired after 10 m. In the two cases remanded, the court found that the Commission had not adequately

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[8] The Commission's definition of indecent language remains "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Pacifica Foundation*, 56 FCC 2d 94, at 98, 100 (1975). In our *Reconsideration Order* we explained that we separately consider the nature of the material involved and the time of broadcast because the time of broadcast is pertinent to whether the broadcast is actionable, rather than to whether it is indecent. *See* 3 FCC Rcd 930, 936 n.6 (1987); *ACT I* at 1338 n.8.

[9] 390 U.S. 629 (1968). In *Ginsberg*, the Court upheld a state statute that prohibited the sale to minors (17 and under) of sexual material deemed by the legislature to be obscene as to children.

justified its narrowing the "safe harbor" during which indecent material could be broadcast from the hours of 10 p.m.-6 a.m. to midnight-6 a.m. The court also rejected the Commission's suggestion that channeling decisions could be made on a case-by-case basis, finding that such an approach could have a chilling effect on broadcasters' exercise of their First Amendment rights. Thus, the court directed the Commission to afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.

7. Shortly after the ACT I decision, Congress directed the Commission to enforce the broadcast indecency provisions of Section 1464 on a 24-hour basis.[10] In response, the Commission promulgated the rule which now is at issue in this case.[11] A number of petitioners challenged the rule, and on January 23, 1989, the D.C. Circuit in *ACT II* stayed its implementation pending judicial review.

8. Before briefing and oral argument had occurred on the merits of the 24-hour prohibition, the Supreme Court, in its *Sable* decision, addressed the extent to which the government may regulate indecent telephone messages. After noting that indecent speech is protected by the First Amendment, the Supreme Court nevertheless affirmed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 109 S. Ct. at

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[10] *See* n.2, *supra*.

[11] 47 CFR § 73.3999 (1989). *See Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 457 (1988).

2836. Restating the point later in its opinion, the Court described the relevant constitutional standard as requiring that the means chosen by the government be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2839.

9. The Supreme Court in *Sable* distinguished the telephone medium from the broadcast medium, noting that "unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." 109 S. Ct. at 2837. Also, in a concurring opinion, Justice Scalia suggested that indecent broadcasts could be prohibited if data demonstrate "the infeasibility of alternate means to provide . . . adequate protection of minors." *Id.* at 2840 (Scalia, J., concurring).

III. DISCUSSION

10. As noted above, based on the record in this proceeding and the Court's decision in *Sable*, we believe that the Commission's enforcement of a 24-hour prohibition on indecent broadcast programming comports with the First Amendment. Using the "compelling interest/narrowly tailored" standard set forth in *Sable*, we conclude that a 24-hour prohibition is the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. In addition, we find that: (1) "children" are appropriately defined as minors 17 and under; (2) the government has a compelling interest in regulat-

ing children's access to indecent broadcast material, as the courts and Congress consistently have found; (3) our definition of indecency is not vague or overbroad and, in fact, repeatedly has been upheld by the courts; (4) other alternatives for protecting children, such as ratings, warning devices, or lock-out mechanisms would be ineffective; (5) because the risk of exposure to children exists even in the late evening and early morning hours, a time channeling approach would not protect children from indecent broadcast materials; and (6) adults have alternative sources of indecent materials. In order to tailor our enforcement of the 24-hour prohibition on indecent broadcasting as narrowly as possible, however, in actual cases of alleged indecent broadcasting stations will be permitted to demonstrate that children were not in fact present in the broadcast audience for the market at the time the programming at issue aired.

A. Constitutional Standard

11. Several parties argue that the constitutionality of the indecency prohibition should be judged under the time, place and manner standard, rather than the more rigorous compelling interest/narrowly tailored standard applied by the Supreme Court in *Sable*.[12] However, based upon the Supreme Court's having applied the more demanding test in *Sable*, and similar views expressed by the D.C. Circuit in *ACT I* that content-based restrictions are sustainable only if "the regulation is a precisely drawn means of serving a

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[12] Morality in Media (MIM) Comments at 23-32; Salem Communications Corporation and Focus on the Family (Salem) Reply Comments at 24-27.

compelling state interest," [13] we believe it appropriate to apply the more rigorous standard.

12. It is well established that the First Amendment does not protect obscene speech, and that therefore the government has broad authority to regulate commerce in obscenity without reference to First Amendment principles. *Sable*, 109 S. Ct. at 2835; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Roth v. United States*, 354 U.S. 476, 481 (1957). In contrast, as the Supreme Court observed in *Sable*, "[s]exual expression which is indecent but not obscene is protected by the First Amendment. . . ." 109 S. Ct. at 2836. *See also Pacifica*, 438 U.S. at 743 (Stevens, J.), 756 (Powell, J.). Nonetheless, the Supreme Court has indicated that it will uphold governmental regulation of indecent speech if the regulation meets the constitutional standards that the Court has articulated.

13. In *Sable*, the Court set forth the constitutional standard that governs restrictions on protected speech: the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S. Ct. at 2836. The Court also stated that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2836, 2839. While the standard has been expressed with somewhat different wording,[14] we understand

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[13] *ACT I* at 1343 n.18, quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

[14] *Cf. United States v. Grace*, 461 U.S. 171, 177 (1983) (regulation must be "narrowly drawn to accomplish a compelling governmental interest"); *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980) (regulation must be "a precisely drawn

it to require, essentially, a showing that the regulation or statute serves a compelling governmental interest and is narrowly tailored to serve that interest. This standard is substantially more rigorous than the time, place and manner test applied to content-neutral regulation of speech,[15] which requires only that the regulation be a reasonable means of serving "a significant governmental interest" and that it leave "ample alternative channels for communication." *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. at 535. *See also Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

B. Governmental Interest

14. In effectuating our statutory mandate, our primary concern has been and remains the protection of children from exposure to indecent materials. *See* 134 Cong. Rec. S9912 (daily ed. July 26, 1988)

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means of serving a compelling state interest"); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (law invalid because state's interest could be "served by measures less intrusive"); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985) (state can exclude speakers if "compelling state interest" and "narrowly drawn exclusion"); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45 (1983) (government must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("closely drawn to avoid unnecessary abridgment," quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

[15] *See ACT I* at 1343 n.18.

(statement of Senator Helms); *Reconsideration Order*, 3 FCC Rcd 930, 931 (1987), *aff'd in relevant part sub nom. ACT I*, 852 F.2d at 1340; *Pacifica Foundation*, 56 FCC 2d at 97, *recon. denied*, 59 FCC 2d 892 (1976), *rev'd, Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977); *rev'd, Pacifica*, 438 U.S. 726. In both *Pacifica* and *Sable* the Supreme Court recognized the government's interest in assisting parental supervision of their children and, generally, in protecting the well-being of youth, citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). *Sable*, 108 S. Ct. at 2836; *Pacifica*, 438 U.S. at 749-750. In the *NOI*, we solicited comment on whether a 24-hour prohibition of broadcast indecency advances this interest. We also noted that courts have recognized an alternative government interest in protecting the public's right to be free from indecent material in the privacy of their homes, and sought comment on this point.

15. Although parties generally agree that the government has an interest in protecting minors from indecent broadcasts, they differ on the scope of that interest. Some parties maintain that the government's sole legitimate interest is to facilitate parental supervision, and not to substitute governmental for parental supervision.[16] In contrast, Morality in Media (MIM) argues that a 24-hour prohibition on broad-

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[16] Capital Cities/ABC (ABC) Comments at 28; Pacifica Foundation *et al.* (Pacifica) Comments at 32; P.E.N. American Center *et al.* (PEN) Comments at 9; Cohn and Marks (C&M) Comments at 20; and Comments submitted jointly by a number of broadcasters and organizations, including the National Association of Broadcasters, CBS Inc., Action for Children's Television, and the American Civil Liberties Union *et al.* (hereinafter collectively referred to as "Broadcasters") at 19, 23.

cast indecency advances an independent governmental interest in the well-being of minors,[17] and that the *Pacifica* decision can be read to establish an "indecent for all" (including adults) standard, and not merely an "indecent for children" standard.[18] On the other hand, Broadcasters argue that there is no legitimate interest in protecting adults from indecency, as adults have a right to receive constitutionally protected indecent material.[19] Several commenters argue that a 24-hour prohibition also advances a governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes.[20] Cohn and Marks (C&M) disagrees, arguing that adults, unlike children, are capable of receiving the "first blow" from constitutionally protected indecent speech without undue damage.[21]

16. It is well established that protecting children from exposure to indecent material is a compelling governmental interest. *See e.g., Sable*, 109 S. Ct. at 2836; *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Carlin Communications, Inc. v. FCC*, 749

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[17] MIM Reply Comments at 15-16.

[18] MIM Comments at 4-5.

[19] Broadcasters Comments at 5-6.

[20] MIM Comments at 12-14; AFA Comments at 2-7; Salem Reply Comments at 49-53.

[21] C&M Comments at 19 n.28. C&M's reference to absorbing the "first blow" derives from *Pacifica*, 438 U.S. at 749: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *See also* n.29, *infra*.

F.2d 113, 121 (2d Cir. 1984). Two related rationales underlie this interest. First, as the Court explained in *Ginsberg* and reiterated in *Pacifia, see* 438 U.S. at 749-750, "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," and parents are "entitled to the support of laws designed to aid discharge of that responsibility," 390 U.S. at 639. Thus, the regulation of broadcast indecency is intended "to facilitate parental supervision of children's listening." *ACT I*, 852 F.2d at 1343. In addition, the Supreme Court has expressly stated that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " *New York v. Ferber*, 458 U.S. at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). As stated by the Court in *Ginsberg*, "[t]he State also has an independent interest in the well-being of its youth." 390 U.S. at 640. The Court quoted with approval from *People v. Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (C.A.N.Y. 1965) (Fuld, J., concurring), which dealt with the sale of sexually explicit material to children:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

390 U.S. at 640. *See also Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (state interest in protecting "the welfare of children" and preventing abuses that might prevent their "growth into free and independent well-developed men and citizens").[22] These two related purposes, supporting parental supervision and promoting the well-being of youth, support the enforcement of narrowly drawn measures to restrict children's access to indecent materials.

17. Despite the fact that protecting children from exposure to indecent material is recognized as a compelling government interest, some parties, including P.E.N. American Center *et al.* (PEN) and Broadcasters, argue that there is no proof that exposure to indecent broadcasts harms children. Broadcasters submit a study that concludes that few studies have been performed regarding harm resulting from in-

[22] There seems to have been some understandable confusion in the past as to the extent to which we relied on both of these two purposes—supporting parental supervision and promoting the well-being of youth—in serving the compelling interest of protecting children. *Compare, e.g., Reconsideration Order*, 3 FCC Rcd at 930 ¶ 3, with 3 FCC Rcd 931 ¶ 11. The court in *ACT I* understood the Commission's position as based solely on its interest in supporting parental authority. *ACT I*, 852 F.2d at 1343. However, the Supreme Court in various cases, including *Ginsberg*, *Pacifica*, and *Sable*, has recognized a broader governmental interest in protecting children which goes beyond merely supporting parental supervision, and Congress specifically referenced this broader interest in directing the adoption of the 24-hour prohibition on broadcast indecency. *See* 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms). We take this occasion to state that, consistent with Congress' direction, the broader view more accurately reflects what we seek to accomplish—specifically, to support parental supervision and to promote generally the well-being of youth.

decency and that there is little evidence of harm to children.[23] On the other hand, Salem Communications Corporation (Salem) and American Family Association *et al.* (AFA) submit studies to support their argument that exposure to indecent broadcasting has the potential to harm children. For example, AFA submitted findings from a clinical psychologist who concludes that children are harmed by pornography.[24]

18. The debate over harm to children is not at issue here. Irrespective of the continuing social science debate, the courts have recognized Congress' authority, derived from the governmental interest in protecting its youth, to regulate access by children to indecent material. As a legal matter, it is well established that exposure of children to such material may be harmful, even if that effect has not been completely proven scientifically. *See Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring); *Ginsberg*, 390 U.S. at 641-43. In proscribing the dissemination of indecent material to minors, Congress has considered testimony that cites its harmful effects and has responded not only with the statute and mandate before us in this particular case, but also with the passage of other statutes that limit the availability of indecent material to minors.[25] For example, Congress

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[23] Broadcasters Comments at Appendix A.

[24] AFA Reply Comments at Appendix 2. In defining pornography, Victor B. Cline, author of the study, noted that "something could be regarded as 'pornographic' but still not be legally obscene." *Id.* at 1.

[25] *See Telephone Decency Act of 1987*, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; *Cable-Porn and Dial-A-*

has acted to protect minors from indecent telephone messages,[26] and the Supreme Court in *Sable* fully recognized Congress' authority to do so (although it held that Congress in that case had not sufficiently tailored its effort to serve this interest). *See* 109 S. Ct. at 2839. Similarly, in 1984, Congress required cable operators to make available to their customers a device to enable them to control reception of indecent programming to protect minors from inadvertent access. *See* 47 U.S.C. § 544(d)(2)(A). More broadly, the Supreme Court has upheld, in the face of a First Amendment challenge, a congressional statute which protects the public, and particularly children, from unwanted mail which the recipient considers offensively lewd. *See* 39 U.S.C. §§ 3008 and 3010 (1988); *Rowan v. Post Office Department*, 397 U.S. 728 (1970). These statutes evidence findings by Congress that children deserve protection from harm that indecent material may inflict. It is significant that the 24-hour prohibition specifically has been mandated by the Congress, and although Congress is not the ultimate interpreter of the Constitution, its findings and purposes are due deference as those of a co-equal branch of government charged with providing for the general welfare of the United States. *See Metro Broadcasting v. F.C.C.* No. 89-453, 58 U.S.L.W. 5053, 5061 (U.S. June 27, 1990).

Porn Control Act, Hearing Before the Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-138.

[26] *See* Pub. L. 98-214, 97 Stat. 1469 (1983); amended by Pub. L. 100-297, 102 Stat. 424 (1988); further amended by Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989).

19. Our concern with the harm to children caused by exposure to indecent broadcast material is particularly strong given the range of materials that could be included in the "indecent" programming category (and thus conceivably could be broadcast between 8 p.m. and 6 a.m., given the current restrictions on our enforcement authority). As Justice Scalia noted in his *Sable* concurrence, "the more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 109 S. Ct. at 2839 (Scalia, J., concurring).

20. It thus is significant that the courts have applied a very narrow definition of obscenity in ruling on pornographic films, holding that movies containing graphic depictions of sex acts, such as "Deep Throat" and "Debbie Does Dallas," are not legally obscene.[27] We recognize that these cases have not in-

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[27] *See United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983). Other movies found not to be obscene included "Insatiable," "Star Virgin," "The Opening of Misty Beethoven," and "Inside Desiree Cousteau." The court described these movies as "examples of hard-core pornography, describing and depicting a wide range of scenes of explicit sex on the part of adults, singly and in groups, including detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation," 709 F.2d at 134. *See also Hermann v. United States*, 259 A.2d 347 (D.C. 1969), holding the movie "Threes, Menage a Trois" not to be obscene. The movie was described by the court as depicting "a succession of more or less disconnected scenes portraying or suggesting sexual activities including repetitive self-fondling of female nipples, lesbian-like stroking, some displays of female genital areas and pubic hair, and poses

volved the broadcast media and that most broadcasters are likely to exercise self-restraint and not air such movies unedited. Our own enforcement actions demonstrate, however, that some broadcasters have been willing to air patently offensive, sexually explicit material that would seem to tread close to the obscenity line.[28]

21. The broad range of sexually-oriented material that has been or could be considered indecent or "protected speech"—but not obscene speech—accordingly heightens our concerns for preventing harm to children. Specifically, we find that Justice Scalia's statement in *Sable* is extremely relevant in the broadcast indecency context. It has become "more reasonable . . . . to insist upon greater assurance of insulation from minors" in light of the extremely pornographic nature of what may be encompassed within the category of broadcast indecency.

22. Although the Commission has focused on the government's interest in protecting children as a basis for regulating broadcast indecency, preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition. In *Pacifica*, the Supreme Court's first stated rationale for sustaining the Commission's decision was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent ma-

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suggestive of cunnilingus between a fully dressed man and a partly dressed woman." 259 A.2d at 348.

[28] Examples of the patently offensive indecent material broadcast by some stations are included in Appendix B.

terial presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder," 438 U.S. 726, 748, *citing Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *Id.* at 759-60 (Powell, J., concurring in part).[29] In *Sable*, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, *i.e.*, that it "can intrude on the privacy of the home without prior warning as to program content." 109 S. Ct. at 2837.[30]

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[29] In his concurrence, Justice Powell noted that "broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away. . . . a different order of values obtains in the home." 438 U.S. at 759 (Powell, J., concurring in part) (citation omitted).

[30] The Court has recognized the government's substantial interest in protecting the privacy of the home in non-broadcast contexts as well. *See, e.g., Frisby v. Schultz*, 487 U.S. 574, 484 (1988) (upholding a narrowly-tailored ban on picketing a specific residence and stating that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 77-78 (1983) (Rehnquist, J., concurring) ("We have often recognized that individuals have a legitimate 'right to be left alone' in the privacy of the home . . . the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds").

23. The government's interest in preserving the privacy of the home reinforces its interest in protecting children. As D.C. Circuit Judge Leventhal noted in his dissenting opinion in *Pacifica*, "[w]ith the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family. Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. . . . The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception—a mere click, without current purchase." 556 F.2d at 33 (Leventhal, J., dissenting). While the record demonstrates that a 24-hour prohibition on broadcast indecency is needed to advance our primary interest in controlling children's access to indecent materials, it also supports this alternative residential privacy interest, particularly the evidence concerning the pervasiveness of the broadcast media, the prevalence of random tuning and remote control devices, and the ineffectivenes of prior warnings. *See infra* at pp. [110a-111a] and [137a-138a].

C. Operative Definitions

1. Definition of Indecency

24. In carrying out its statutory responsibility to enforce Section 1464, the Commission consistently has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Pacifica Foundation*, 56 FCC 2d at 98, 100 (1975), *aff'd*, *F.C.C. v.*

Pacifica Foundation, 438 U.S. 726 (1978); *Reconsideration Order*, 3 FCC Rcd at 930 ¶ 2 (1987), *rev'd on other grounds*, *ACT* I, 852 F.2d at 1338-39.[31] We continue to believe that this definition is sufficiently narrow to pass muster under the First Amendment. Indeed, we note that the U.S. Court of Appeals for the D.C. Circuit, relying upon the Supreme Court's opinion in *Pacifica*, explicitly affirmed this definition recently in *ACT I*, 852 F.2d at 1340.

25. Many commenters agree that the Commission's generic definition of indecency retains its validity because it is sufficiently narrow and has survived Supreme Court scrutiny.[32] Others, however, claim that the definition is unconstitutionally vague,[33] and that the vagueness could suppress broadcast material with serious literary, artistic, social, and cultural value, as well as discussions on a range of subjects.[34]

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[31] Our initial definition of indecency included the language "when there is a reasonable risk that children may be in the audience." *Pacifica*, 56 FCC 2d at 98. Starting with our 1987 decisions, however, we have treated the nature of the material involved and the presence of children in the audience as separate issues because the question whether there is a reasonable risk of children in the audience is "more pertinent to . . . whether a broadcast is 'actionable' under 18 U.S.C. § 1464 than to whether it is indecent." *Reconsideration Order*, 3 FCC Rcd at 936 n.6. *See supra*, n.8.

[32] *See, e.g.*, MIM Reply Comments at 22-25; Salem Reply Comments at 10-21; and AFA Reply Comments at 3-7.

[33] *See, e.g.*, Broadcasters Comments at 35-40; PEN Comments at 11-16; Post-Newsweek Stations (Post) Comments at 1-2; ABC Comments at 19-21; C&M Comments at 7-16; and Cox Comments at 9-15.

[34] PEN Comments at 16-20; Pacifica Comments at 13-20; Post Comments at 2-5; and KDVS Comments at 11-14.

Several parties argue that the Commission should adopt a rule that defers to the reasonable, good faith judgments of licensees.[35] Finally, Broadcasters argue that a licensee should have a right to a trial *de novo* whenever the Commission applies the definition to specific circumstances.[36]

26. We do not believe that application of our definition of indecency will lead to unconstitutional censorship. We have emphasized that "subject matter alone does not render material indecent. Only when that matter is presented in a *manner* that is patently offensive will it be considered indecent." *Reconsideration Order*, 3 FCC Rcd at 932 (emphasis in original).[37]

27. Furthermore, we will continue to give weight to reasonable licensee judgments when deciding to impose sanctions in specific cases. We cannot, however, abrogate our statutory duty to enforce Section 1464 by deferring absolutely to broadcasters' judgments. *See ACT I* at 1340 n.14. Finally, in response to the suggestion by Broadcasters that a trial *de novo* be available, we note that under the procedure we have utilized for indecency enforcement actions, issuance of notices of apparent liability, a trial *de novo* is in fact available to any station that challenges the Commission's determination by not paying its forfeiture. *See* 47 U.S.C. § 504.

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[35] Broadcasters Comments at 40; ABC Comments at 36-41; and Arizona Board of Regents *et al.* (Joint Parties) Comments at 22-23.

[36] Broadcasters Comments at 44.

[37] We also note that the courts already have determined that our definition of indecency is not unconstitutionally vague. *See ACT I* at 1338-1339.

2. Definition of Children

28. We find that for the purpose of enforcing Section 1464,[38] children ages 17 and under constitute the category of persons that should be defined as "children." This conclusion is supported by the legislative history of the statutory 24-hour prohibition against indecent broadcasts. Supreme Court decisions addressing the regulation of other sexually explicit indecent materials, and other statutes governing the availability of indecent materials to children.

29. In the *NOI*, we noted that our 1987 enforcement rulings indicated that children 17 and under should be protected from indecent broadcasts, and sought comment on whether we should continue to so define children. Arguing generally that including all minors would be consistent with state laws protecting minors from other sexually explicit speech, some parties agree that "children" should include persons 17 years old and under.[39] However, opposing parties argue that even though states may protect children from obscenity, they do not protect children from indecency,[40] and that in any event there is no evidence that exposure to indecent speech harms children.[41]

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[38] Section 1464 states that "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[39] *See, e.g.*, AFA Comments at 13; Bonneville International Corporation (Bonneville) Comments at 5; and Salem Reply Comments at 21-24.

[40] *See* Broadcasters Comments at 26-29. *See also* Cox Enterprises (Cox) Comments at 26-28 and PEN Comments at 20-23.

[41] Broadcasters Comments at 13-17 and Appendix A; Broadcasters Reply Comments at 10-12; Pacifica Comments at 30-31; and ABC Comments at 23-28.

30. Defining children to be protected from indecent broadcasts as those 17 years old and under is consistent with the legislative history of the statutory provision requiring the Commission to enforce Section 1464 twenty four hours a day. That history reveals that the statute's author intended to encompass children 12 to 17, as well as those under 12, within the class of persons to be protected by the 24-hour prohibition.[42] Since the statutory provision originated as an amendment introduced on the Senate floor, no committee reports exist for reference. The author's explanation, delivered immediately before the measure was adopted, therefore must be accorded substantial weight in interpreting the provision.[43]

31. In addition, defining children as those 17 and under is consistent with other laws regulating the availability of sexually explicit indecent materials to children. One such statute is the "dial-a-porn" prohibition, 47 U.S.C.A. ¶ 223(b)(3) (Supp. 1990), enacted in 1989, which prohibits indecent telephone communications to persons under the age of 18. This provision is strong evidence that Congress has found

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[42] In enacting the 24-hour prohibition, Senator Helms, the author of the legislation, relied upon data regarding children 12 to 17 in arguing for enactment of the prohibition and, therefore, intended for it to apply to this age category. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

[43] *See North Haven Board of Education v. Bell*, 456 U.S. 512, 526-527 (1982); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (remarks of legislation's sponsor is an authoritative guide to statute's construction and deserves to be accorded substantial weight). *See also National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

that persons 17 and under should be protected from indecent materials. In addition, contrary to the comments cited above, the *NOI* at Appendix A lists statutes from 38 states that penalize persons for disseminating to minors materials that are sexually explicit, and not necessarily obscene by adult standards. Most of these state laws protect children ages 17 and under.

32. The government's interest in protecting children 17 and under from exposure to indecent materials also has been recognized by the courts. For example, when discussing an earlier version of the "dial-a-porn" statute, the Supreme Court in *Sable* explicitly recognized the government's "compelling interest in preventing minors from being exposed to indecent telephone messages," and tacitly approved Congress' decision to apply the statute to children ages 17 and under. 109 S. Ct. at 2839. Similarly, in *Ginsberg*, 390 U.S. at 631, and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, the Supreme Court found a compelling governmental interest in controlling the availability of indecent matter to persons in the 12-17 age group. These precedents make clear that the government has a legitimate interest in protecting persons 17 and under from exposure to indecent broadcast materials.

33. We recognize that the court in *ACT I* criticized the Commission for not clearly defining "children" for purposes of applying Section 1464 and for failing to justify its application to the 12-17 age group.[44] In

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[44] The Court in *ACT I* noted that the Commission in a 1976 legislative proposal had recommended that the regulation of broadcast indecency be directed to protecting children under 12. *See* 852 F.2d at 1342, citing 122 Cong. Rec. at 33,367 n.119. At the time, we made this recommendation for two

this report we clarify that all children 17 and under will be included in the protected age group. We find sufficient justification for adopting this definition in analogous federal and state statutes, Supreme Court precedent, and in the legislative history of the 24-hour statutory prohibition against indecent broadcasts. Accordingly, for purposes of protecting children from exposure to indecent broadcast materials, we will consider "children" to be persons age 17 and under.

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reasons. First, we proposed that broadcasters could defend against an indecency complaint by showing that they had made efforts to minimize the risk of exposure to children. Including 18-year olds in the defintion of children, we feared, would deprive broadcasters of this defense because of the difficulties inherent in effectively shielding 18-year olds from indecent programming. Second, we observed that age 12 "is the accepted upper limit for children's programming in the industry and at the Commission." 122 Cong. Rec. at 33,367 n.119; *see* 122 Cong. Rec. at 33,364 (Sept. 29, 1976).

However, now outside the confines of that debate and on further examination, we conclude that the appropriate "upper limit for children's programming" differs from the appropriate upper limit for protecting children from exposure to indecent material. To the extent the public interest requires broadcasters to offer age-specific or other special programming for children, that interest subsides when the child reaches an age, such as 12 years old, when general interest programming serves his or her needs. In contrast, the wide usage of the age of 17 and under in other federal and state laws intended to protect children from access to sexually explicit material demonstrates the general acceptance of the need to protect children older than 12 from exposure to such material. Moreover, our recommendation to Congress in 1976 simply struck a different balance between the need to protect children and the rights of adults to see or hear indecent matter from that struck by Congress in 1988 when it directed the Commission to enforce the prohibition on indecent broadcasting 24 hours a day.

D. Narrowly Tailored Means

1. Accessibility to Children

34. As did the Supreme Court in *Pacifica*, we find that the broadcast medium is uniquely pervasive and accessible to minors, and that these characteristics further justify prudent regulation of indecent broadcast programs. The Supreme Court has recognized that "each medium of expression presents special First Amendment problems," *Pacifica*, 438 U.S. at 748. Broadcasting has specific characteristics that support regulation of indecency that would not necessarily be permissible if applied to other media. In particular, for purposes of regulating indecent broadcasting, the Court has noted "that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" *Sable*, 109 S. Ct. at 2837, quoting *Pacifica*, 438 U.S. at 748-49.[45]

35. Notably, the Supreme Court in *Sable* distinguished indecent telephone services from broadcasting, observing that the caller to a "dial-a-porn" service must "take affirmative steps to receive the communication," 109 S. Ct. at 2837. In contrast, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Pacifica*, 438 U.S. at 748. Thus, "[p]lacing a telephone call is not the same as turning on a radio and

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[45] Similarly, in enacting the 24-hour prohibitions on broadcast indecency, the statute's author expressed concern regarding the pervasiveness and accessibility of the broadcast medium. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

being taken by surprise by an indecent message." 109 S. Ct. at 2837.

36. The *Sable* decision strongly suggests that a 24-hour broadcast indecency prohibition is constitutional if it is the most narrowly tailored means of protecting children from exposure to indecent materials. The reversal of the dial-a-porn prohibition in *Sable* rested not on the failure to channel such communication, but on the government's failure to show that a complete prohibition on indecent dial-a-porn was necessary to meet the government's interest in protecting children from the indecent material. The emphasis the Court placed on the inadequacy of the record in *Sable* thus supports a conclusion that a total prohibition on indecency would be upheld if the record demonstrates that no alternative would effectively serve the compelling interest at stake.

37. The record in this proceeding confirms the general pervasiveness and accessibility of broadcasts to children. TV, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old.[46] Between 25% and almost 50% of children have a TV set for their personal use.[47] Radio is even more pervasive, with each household having an average of over five radios. Over

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[46] *NOI* at 8361.

[47] *Id.* Additonal data submitted by AFA illustrates the pervasive nature of television, using the Chicago television market as an example. Chicago has 5 VHF and 3 UHF TV stations, of which most broadcast at least 20 hours a day, 7 days a week. As a result, for over 80% of all hours in a week, day or night, there are at least 8 different programs being broadcast simultaneously. In a typical 168 hour broadcast week, there are over 1,120 hours of programs broadcast. AFA Comments at 41-42.

99% of children age 12 to 17 listen to radio at least once a week.[48] Moreover, as described in detail *infra*, children do not just have general access to the broadcast media, but they in fact tune in to their radio and television sets without meaningful supervision at all times of the day and night.

2. Children's Listening and Viewing Habits

38. The record indicates that there are children in the radio and television audience at all hours of the day and night. The data further shows that a significant number of these children are not subject to active parental supervision, even during the late evening and early morning hours.

a. Radio

39. The data submitted in response to the *NOI* indicate that there are children in the radio listening audience at all times of day, with an average of nearly three-quarters of a million children listening to radio between midnight and 6 a.m. From this data we conclude that there is no time during which indecent material could be broadcast on radio without a reasonable risk that significant numbers of children will be listening to it.

40. The Commission's initial review of radio ratings and surveys revealed little quantitative information about the radio listening habits of children under 12 years of age, although listening data for children ages 12-17 were available. These data indicated that, in all time frames measured, including midnight to 6 a.m., a higher percentage of all children ages 12-17 listened to radio than the percentage of all adults

[48] *Id.*

18 and over listening to radio. Furthermore, post-midnight listening for children ages 12-17 averaged 2¾ hours per week.[49]

41. The *NOI* indicated that the national listening audience for children ages 12-17 between midnight and 6 a.m. peaked at 1,471,000 between 12:00 and 12:15 a.m., decreased gradually to a low of 309,000 between 3:45 and 4:00 a.m., and then increased to 1,429,000 between 5:45 and 6:00 a.m. The average quarter-hour audience for the entire six hour block of midnight to 6 a.m. was 716,000 children ages 12-17. The average one day cume (the estimated number of *different* persons who listen to radio for a minimum of five minutes within a specified time frame) for between midnight and 6 a.m. was 3,533,000 children ages 12-17. That is, during any given midnight to 6:00 a.m. time frame on any given day, 3,533,000 different children ages 12-17 in the United States listened to the radio for at least five minutes. The weekly cume for listening between midnight and 6 a.m. was 10,896,000 children ages 12-17. These listeners constituted 10 to 12 percent of the post-midnight total listening audience and this proposition was generally consistent for daytime listening as well.[50] We requested comment on these data and asked commenters to submit any other data or studies regarding listening habits of children and adults.

42. Commenters supporting the 24-hour prohibition submit that children ages 12-17 make up a substantial portion of the radio audience. MIM submits radio listening data for children ages 12-17 for New York, Chicago and Los Angeles collected by Arbitron

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[49] *Id.* at 8361.

[50] *Id.*

for the summer of 1989.[51] MIM combines the data for the three markets and makes a national projection of post-midnight listening by children ages 12-17 that is remarkably close to the national data presented in the NOI.[52] MIM estimates that from 12 to 1:00 a.m. the average quarter hour audience for this age group nationally is 1,334,557, which is very close to the Commission's estimate of 1,429,000 for 12 to 12:15 a.m. MIM's estimated low in listening among children ages 12-17 occurs at 4-5 a.m. with 220,067 in the audience, whereas the Commission estimated 309,000 in the audience from 3:45 to 4:00 a.m.

43. Bonneville International Corporation (Bonneville) reviewed data on audiences for several of its radio stations that it classifies as having "some teen appeal," and found that children ages 12-17 are in the audience post-midnight. Bonneville also reviewed data for non-Bonneville stations in markets in which Bonneville has stations and, similarly, found stations with greater post-midnight listening by children ages 12-17 than any other demographic group.[53] Salem submits a Bakersfield, California, radio study showing that 28% of children ages 12-17 in that market listen to radio between midnight and 6 a.m.[54] National Religious Broadcasters (NRB) also submits radio data for Detroit and Tampa showing large numbers of 12 to 17 year olds listening to radio at all times of the day and night.[55]

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[51] MIM Comments at 42-62.

[52] *NOI* at 8361.

[53] Bonneville Comments at 6-7. Bonneville's statistics are from Spring 1989 Arbitron Radio Ratings (Metro AQH M-F midnight - 1:00 a.m.).

[54] Salem Reply Comments at Exhibit 1.

[55] NRB Reply Comments at Exhibit 2.

44. Broadcasters claim that the audience for certain programming that the Commission is reviewing as (or has deemed to be) indecent contains few children, referring to a Gallup survey of New York area households with children ages 6-11 commissioned by Infinity Broadcasting indicating that in 99.6% of households surveyed, no children in that age group listen to the Howard Stern morning radio show.[56] In the sole household that reported a child listening to that show, it was reported that the child was supervised by an adult.[57] MIM responds that although Broadcasters assert that few children ages 6 to 11 listen to the Howard Stern show, there are older children in the audience. As reported in Arbitron's *Summer 1989 "Radio Market Report"* for New York, only 5 of the 48 stations listed for the New York market have a greater audience of children ages 12-17 than WXRK-FM Monday through Friday, 7-8 a.m., when a portion of the Howard Stern show is broadcast. MIM further states that Arbitron reports an estimated 10,600 children ages 12-17 listened to the Stern show for at least 5 minutes during any quarter hour from 7-8 a.m. Monday through Friday in the summer of 1989.[58]

45. Other commenters opposing the 24-hour prohibition dispute the Commission's initial findings and submit radio listening data in support of their position. KDVS-FM (KDVS) urges that channeling be

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[56] Mr. Stern's morning radio show was the subject of one of the Commission's 1987 indecency decisions. *See Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987).

[57] Broadcasters Comments at 26 n.65, citing a poll by the Gallup Organization, WXRK Radio, Special Listenership Study (Dec. 1989).

[58] MIM Reply Comments at 20.

used to enhance parental responsibility, and states that Arbitron and other radio surveys suggest that the number of young children in the audience during school hours is only between 3 and 5% of the potential audience of children ages 12-17. This group comprises only 1-4% of the total audience during these broadcast hours. Both of these figures are far lower than those seen in the 11 p.m.-midnight sampling, and approximate the post-midnight sampling. KDVS claims that these statistics suggest two appropriate times for channeling—during the school day and the late evening hours. KDVS also states that the same survey (Arbitron *Fall 1983*) reported that, during Monday through Friday, 7 p.m. to midnight, only 10% of the total audience of children ages 12-17 listened to radio outside the home at those hours. Therefore, argues KDVS, most of the children in the radio audience would be subject to adult supervision.[59]

46. KDVS also states that children ages 12-17 make up only 10% of a very small midnight to 6 a.m. listening audience. KDVS maintains that nationally, only about 3.5% of children ages 12-17 are present in any quarter hour post-midnight time frame for all stations. KDVS estimates that if this age group comprises 10% of the population, then the 3.5% of all children ages 12-17 listening to radio post-midnight represents only 0.35% of the entire population.[60] Finally, KDVS states that the Commission, in the *NOI*, did not identify estimates of the sampling error or relative standard error involved in the ratings.[61]

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[59] KDVS Comments at 7-9.

[60] KDVS Reply Comments at 3-4.

[61] *Id.* at 5-6.

47. Pacific *et al.* (Pacifica) also claims that listening statistics regarding children ages 12-17 are flawed in their application. Pacifica states that the Commission gives the impression that a significant number of children in this age group listen to radio generally. Pacifica, like KDVS, claims that the percentage of children ages 12-17 of the total listening population (the largest possible representation of these data) does not reflect the percentage of these children in the actual total population. Pacifica states that the 12-17 year old listening population should be divided by the total population to obtain a more realistic representation of this group's listening.

48. Pacifica further observes that such data do not reflect children's listening to public radio stations. Pacifica relies on data from Arbitron, Spring 1989, to conclude that children ages 12-17 listening to public radio stations account for a mere 0.2% share of this group's listening radio and no [0] share of total radio listening. Only 1.5% of the population of children ages 12-17 tuned into public radio for 5 minutes during an average week from this survey.[62] Broadcasters also refer to the minimal audience of children ages 12-17 that National Public Radio (NPR) attracts. Broadcasters submit that, according to the Arbitron National Report (Spring 1989), member stations carrying NPR programming have *no* measurable audience in this age group from 6 to 10 a.m. and 6 p.m. to 6 a.m.[63]

49. The submitted data confirm our initial determination that there are a significant number of children in the listening audience at all times of day and

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[62] Pacifica Comments at 23-25 and Attachment 4.

[63] Broadcasters Comments at 26.

night. MIM, Salem and NRB have submitted data illustrating that the listening patterns of children ages 12-17 are similar to those described in the *NOI*,[64] which indicated that the percentage of children in this age group listening to radio during all time frames was higher than the percentage of adults age 18 and over listening to radio.[65] These 12 to 17 year olds represent over 10% of the 6.9 million total average quarter-hour listening audience from midnight to 6 a.m.[66] Although KDVS maintains that there are few children ages 12-17 in the listening audience during the day, even low numbers of children (KDVS' submission indicates that 1-4% of the total audience is children ages 12-17) confirm that there are significant numbers of children listening to radio during school hours. Similarly, although KDVS maintains that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population, this figure represents 3.5% of all children in this age group in the U.S., or 716,000 children ages 12-17.[67]

b. Television

50. Our initial data, and data supplied by several commenters, validate the Commission's concerns re-

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[64] *NOI* at 8361 and Appendix B, Tables 3 and 4.

[65] *NOI* Appendix B, Table 3.

[66] With regard to KDVS' concern that the Commission omitted estimates of the sampling error or relative standard error in the data presented in the *NOI*, the Commission does not attach the rating companies' description of methodology with error and reliability estimates for their data. However, these descriptions are readily available in ratings reports, and do not suggest that this information is systematically skewed.

[67] *NOI* at Appendix B, Table 4.

garding children's viewing, especially late night viewing, of television. These data demonstrate that there is a reasonable risk that a significant number of children are present in the nationwide television viewing audience at all times.

51. The *NOI* stated that, based on ratings data, children are in the television audience throughout the day. Unlike radio, there are no reported data reflecting television viewing by age between 2:00 and 6:00 a.m. That which is available, however, demonstrates that children, particularly those ages 12-17, remain in the viewing audience throughout the last reported time period ending at 2:00 a.m. The data also indicate that between 3% (for ages 2 to 5) and 8% (for ages 12-17) of children's weekly viewing occurs between 11:00 p.m. and 1:00 a.m. The *NOI* also analyzed Arbitron data depicting the percentage of persons by age group that watch TV from 6:00 p.m. to 1:45 a.m. in four selected markets. These data show that percentage-wise, as many children ages 12-17 as adults watch television during the late evening hours, and that a higher percentage of 12 to 17 year olds than adults may watch television during these hours in some markets during the summer months.[68] We requested comment on these data and solicited additional studies or data regarding children's viewing.

52. The United States Catholic Conference (USCC) submits results of a radio listening and television viewing survey of almost 8100 children attending Catholic diocesan schools (5,726 age 12 and under and 2,346 age 13-18). The USCC survey indicated that children 12 and under watch an average of 3.5 hours of television per day, mostly from 3-9 p.m.

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[68] *NOI* at 8362 and Appendix C.

Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 8-11 a.m. and 7-11 p.m. USCC also reported that children age 13-18 watch an average of 3.5 hours per day, mostly from 4-11 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 7-9 a.m. and 2-11 p.m.[69] USCC concludes that *if* a reasonably clear distinction between times when children are and are not in the audience can be discerned, then time of day restrictions for the broadcast of indecent material could be established.

53. KDVS takes issue with the Commission's graphic representation of Arbitron television viewing data for the four markets that appear in Appendix C of the *NOI*. It asserts that the post-10:30 p.m. periods are measured in fifteen-minute intervals, whereas pre-10:30 p.m. time periods are measured in thirty-minute intervals, thus depicting the rate of audience decline after 10:30 p.m. as slower than it is in reality. KDVS further states that the Commission has implied incorrectly that the proposition of age groups represented on the charts is indicative that each group is smaller in size.[70]

54. Several commenters have filed evidence indicating that children comprise a significant portion of the late night audience. Salem and NRB submit data showing that, in five metropolitan areas, the number of children in the viewing audience late at night is substantial.[71] For example, in the Washington, D.C.

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[69] USCC Comments at 5. We note that USCC admits that the results of its survey are not conclusive, and that it was unable to receive a full response to its survey. *Id.* at 5-6.

[70] KVDS Reply Comments at 4.

[71] Salem Reply Comments at Exhibit 2 and NRB Reply Comments at Exhibit 1, citing data from Arbitron *Television Market Reports* for the five markets for July 1989.

market, for July 1989, seven percent of children ages 12-17 and four percent of children ages 2-11 are in the viewing audience from 1:45 to 2:00 a.m., Monday through Friday. Salem averages the data for the five markets and projects the national television audience for various post-11:00 m. time frames. For the 1:45-2:00 a.m. period, Salem projects that, nationally, 4.8% of children ages 12-17 watch television. This translates to over 970,000 12 to 17 year olds in the television audience at that hour.[72]

55. These data and our initial data confirm our belief that there is a reasonable risk that significant numbers of children are watching television at all times, including late at night. USCC's suggestion that distinctions can be made as to when children are or are not in the viewing audience is unpersuasive. Its survey indicates only that children watch TV *mostly* in certain time frames, but these time frames are not all-inclusive of children's viewing. In addition, we note that 66.9% of U.S. television households have videotape recorders (VCRs).[73] Through VCRs, children can record late night programming for viewing during daytime, thus obtaining access to programs even if they are not in the audience when the programs are initially aired.

56. KDVS' arguments regarding the data presented in the *NOI* also are unpersuasive. Depicting audience in 15 minute intervals as opposed to 30 minute intervals from 10:30 p.m. to 1:45 a.m. achieves a greater level of accuracy in the measure-

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[72] Salem multiplies the 20,254,000 total population of 12 to 17 year olds cited in the *NOI* by 4.8% to arrive at 972,192 children in this age range. Salem Reply Comments at 65.

[73] *1990 Nielsen Report on Television* at 1.

ment of late night TV audiences. Using 30 minute increments does not alter the percentage of each age group that is watching TV at those times. We agree with KVDS that the rate of decline for *all* audience segments is relatively steep late at night. This does not change the evidence indicating that children remain in the viewing audience late at night. With regard to KDVS' contention that the Commission implied that each age group in the four markets charted in Appendix C of the *NOI* is similar in size, such an implication was not made. The *NOI* states that the percentage of each demographic group is represented on the chart. While the percentages of each group are, in some cases, equal, the actual number of each group are not. Nevertheless, there appears to be a reasonable risk that significant numbers of children are in the television viewing audience at all times.

c. Supervision

57. As previously noted, the government has a clearly established compelling interest in protecting children from exposure to indecent broadcast materials, both to facilitate parental supervision of their children and to generally promote the well-being of youth. In order to compile a record with respect to supporting parental supervision, the *NOI* requested comment on parents' ability to supervise children's listening and viewing, whether parents in fact supervise listening and viewing, and whether parents are concerned about their children's exposure to indecent broadcasts. Our preliminary finding was that there is significant unsupervised television viewing by children on a daily basis. In addition, while there are fewer data available to measure unsupervised radio listening among children, we preliminarily concluded

that, because of the number of radios per household, a significant number of children have the opportunity for, and actually engage in, unsupervised listening.[74] Our review of the record in this proceeding confirms the validity of these preliminary findings, and demonstrates that unsupervised children are watching and listening to television and radio at all times of day and night.

58. Broadcasters dispute the *NOI*'s assumption that in order to supervise their children, parents must co-view or co-listen with them or have specific knowledge of their viewing or listening. Broadcasters argue that as long as parents or other adults are present, they have the opportunity to supervise their children's viewing and listening. Broadcasters maintain that examining the presence of adults as the key to whether children are subject to adult supervision is analogous to the methods used by courts to examine the regulation of indecent material by cable and telephone. Rather than examining the actual use of technical devices to block reception of indecent material transmitted by cable or telephone, or examining parental supervision, Broadcasters state that courts instead analyze the opportunity to use these methods to block reception.

59. Broadcasters commissioned a survey of 1,000 homes with children 17 and under to determine opportunities for parental and adult supervision. According to the survey, over 88% of children were under parental supervision and 98% were under adult supervision between the hours of 8:00 p.m. and 6:00 a.m. During the 10:00 p.m. to 6:00 a.m. period, over 93% of children were under parental supervision and 99% were under adult supervision. Between mid-

[74] *NOI* at 8363.

night and 6:00 a.m., over 98% of children were under adult supervision.[75] Broadcasters claim these data demonstrate that parents or other adults have the opportunity to supervise their children's viewing and listening during these hours.

60. MIM disputes Broadcasters' study, arguing that under the "opportunity for supervision" theory advanced by Broadcasters, the study equates presence with supervision, assumes that a child will not watch television or listen to the radio after his or her bedtime, and assumes that supervision by anyone over 18 is the equivalent of parental supervision.[76] AFA argues that even if a child is in the presence of an adult, that adult may not supervise a child as a parent would.[77] Even when parents are home, AFA argues, there is limited parent-child co-viewing of television. AFA submits the results of a 1989 study of co-viewing habits of parents and children that concludes that parents generally do not view family series with their children. The study found that, on average, parents and second graders co-viewed 5.6 prime time and 1.96 syndicated series in the last year. Parents and sixth graders co-viewed 7.21 prime time and 2.05 syndicated series, while parents and tenth graders co-viewed 7.63 prime time and 2.8 syndicated series. The study determined that for all series and for prime time series only, the mean co-viewing frequency was between something less than "just a few times this year" and "have watched [together], but not in the last year."[78] The authors of this study claim that

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[75] *Id.* at 32-34, Appendix C.

[76] MIM Reply Comments at 18-19.

[77] AFA Reply Comments at 8.

[78] AFA Comments at 38-39.

"parents co-view with children, particularly when their viewing preferences coincide, and that co-viewing is associated with generally positive parental attitudes toward television and specific beliefs in encouragement for children learning from television. [The data] do not, however, suggest that co-viewing is very much motivated by an active determination to mediate children's television experiences." [79] On the other hand, USCC submits a survey of over 8,000 parochial school students showing that 81% of the respondents ages 12 and under, and 70% between the ages of 13 and 18, watch television with an adult at night. The study also shows that 72% of the respondents ages 12 and under, and 90% between the ages of 13 and 18, sometimes or almost never listen to radio with an adult.[80]

61. The record before us demonstrates that the pervasiveness and accessibility of television and radio, coupled with the lack of effectual parental control mechanisms, discussed *infra*, make effective parental supervision exceedingly difficult if not impossible for the average parent. We noted in the *NOI* that 63% of television households have more than one television set, and of the ninety-nine percent of households with radios, each household has, on average, over five.[81] The number of televisions and radios in households can easily prevent a parent from actively supervising a child's viewing and listening habits. In a household with more than one television, a child may watch a program without parental knowledge. VCRs permit a

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[79] *Id.* at n.55.

[80] USCC Comments at 5-6.

[81] *NOI* at 8361.

child to tape a television program for later viewing without parental knowledge. The ability to listen to radio without parental knowledge is even greater, given the number of radios in the average household, their portability, and the widespread use of headphones.

62. We note, moreover, that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls. Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. Upon request, cable operators must provide a device such as a "lock-box" or "parental key" that permits a subscriber to restrict access to selected programming,[82] and access codes and scrambling are among the methods which can restrict children's access to dial-a-porn services.[83] In both instances, these methods can restrict access by children whether or not parents are physically present and actively supervise. In the case of television and radio, however, there is no comparable means that is readily available upon which parents may rely to prevent children from watching indecent off-the-air broadcast television programs or listening to indecent radio programs. Most television receivers do not permit blocking of specific channels,[84] and channel block-

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[82] Cable Communications Policy Act of 1984 § 624(d)(2), 47 U.S.C. § 544(d)(2).

[83] *See* 47 U.S.C.A. § 223 as amended by Pub. L. 101-66, 103 Stat. 1159, 1192-1194 (1989); *Regulations Concerning Indecent Communications by Telephone (Report and Order)*, FCC No. 90-230, adopted June 14, 1990.

[84] In reply comments, Broadcasters submit a list compiled by the Consumers Union of selected television models cur-

ing devices are not available for radios. There is no evidence in the record that a lock-box type of device is available for attachment to televisions and radios to prevent access to specific channels. Therefore, because parents cannot rely on technical devices to prevent children from viewing indecent programs, parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times. As many concerned parents filing comments in this proceeding emphasized, however, it is not practical for parents to exercise this type of control. The letter of Elizabeth Urquhart of Houston, Texas, addressed to Commissioner Dugan, succinctly sums up the point made in a large number of other letters submitted in this proceeding in stating that "[I]t is not a matter of my responsibility to monitor. A person (parent) would have to be super

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rently sold in the United States. Broadcasters claim that over 120 models are equipped with a channel blocking feature that prevents unauthorized access to channels. Broadcasters Reply Comments n.14, Appendix 5. Virtually all of the televisions on this list have at least a twenty-inch screen and, judging by the list price, appear to be color televisions. Broadcasters provide no data showing the market share held by these models. No commenters submitted evidence as to whether channel blocking devices for attachment to existing television sets are available. Furthermore, Broadcasters offer no information as to how channel blocking works, particularly whether a channel blocking feature completely prevents access to a particular channel or whether it may easily be circumvented. Moreover, most television sets in homes today do not have any blocking mechanism. Finally, no party has submitted evidence regarding the feasibility of using televisions with channel blocking in this context, or of the market penetration of these televisions.

human to monitor every program a child might watch —in and out of our home [*sic*]."[85]

63. We do not believe that Broadcasters' study demonstrates that parental presence alone can adequately protect children from indecent broadcast programming. Broadcasters' data show that at no time during the day are all children under parental supervision. Even during the period of time from 1:00 a.m. to 6:00 a.m., the survey found that 1.2% of the children were neither with a parent nor asleep.[86] Since children are in the broadcast audience during this period, it is not unlikely that some of these children could watch indecent programming broadcast

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[85] Many letters submitted in this proceeding emphasized the impossibility of close supervision. Representative of these are the following five: Mrs. Barbara Gigous of Warsaw, Indiana, wrote: "I have two teenage boys who have their own walkmans and tape recorders. There is no way that I can know what they are listening to all the time." Donald and Sandra Lee of Irving, Texas stated: "As working parents, our children have access to television at times when neither my husband nor myself are available to screen their viewing. The radio is available everywhere they go and it is equally offensive. . . ." Yvonne Thomas of Boonsboro, Maryland, a public school teacher, wrote "Many children live alone with a television as both parents are working." Another teacher, Ann Davis of Shrewsbury, Pennsylvania, wrote: "I tuned in the radio about 6 A.M. to see if any of the schools had been delayed [due to inclement weather]. This was the station suggested at school to listen to. I heard the most foul language and sexual innuendos I'd ever heard in public. . . . I had to ask [my son] to leave the room saying that I would let him know when the announcement was made." Cheryl Mayer of Bronson, Michigan, reported: "As I was driving my four children to school one morning, around 7:30, I was appalled at what I heard on a radio station. . . . two D.J.'s were being very crude."

[86] Broadcasters Comments, Appendix C, Table 2.

late at night. In addition, although the survey asked parents if the child in question was "in the presence of at least one parent, stepparent, or legal guardian," the term "presence" was apparently undefined. A respondent may have answered that the child was in the "presence" of a parent even if the child was awake in another part of the home and the parent asleep. Nor did the survey ask what parents were doing during the hours that they were in the presence of children. Because there is no technical means to prevent children from viewing or listening to particular programs, supervision requires parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times. As a practical matter, mere "presence" in the same house as a child does not necessarily translate into supervision.

64. Commenters have not disputed our estimates of the amount of unsupervised television viewing by children. Our analysis, based on a 1980 study of 817 American households with children between the ages of 6 and 17, estimated that the maximum amount of unsupervised children's daily viewing ranges from 212 to 222 minutes and the minimum ranges from 40 to 54 minutes.[87] We also estimated that among children in certain age groups the maximum amount of unsupervised children's daily viewing could range from 357 to 375 minutes, if we assume that all of a child's viewing in two-television household occurs on a separate set from the parents'.[88] The *NOI* also suggested that the number of radios in households made a substantial amount of unsupervised radio listening by children likely. The data submitted by the parties to this proceeding do not refute these estimates. In any

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[87] *NOI* at 8363 and Appendix B, Table 5 at 8376.

[88] *Id.*

event, the record demonstrates that parents cannot always provide meaningful supervision, even when they are present at home. Accordingly, we conclude that there is a substantial amount of unsupervised viewing and listening by children, and that as a practical matter, the pervasiveness and technology of broadcasting serve to deny parents the means necessary to exercise effective control over these activities.

d. Conclusions

65. The above evidence indicates that there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night. The number of children present, moreover, clearly is more than "a few of the most enterprising and disobedient young people." *Sable*, 109 S. Ct. at 2838. For example, evidence submitted by the commenters indicates that, in all time frames measured, a higher percentage of all children between the ages 12 and 17 listen to radio than the percentage of all adults age 18 and over, even between midnight and 6 a.m.[89] Although some commenters claim that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population,[90] this figure represents a full 716,000 children between the ages of 12 and 17.[91]

66. Similarly, the record demonstrates that there is a reasonable risk that a significant number of

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[89] MIM Comments at 42-46; Salem Reply Comments at Exhibit 1; NRB Reply Comments at Exhibit 2; *see also NOI* at 8361 and Appendix B, Tables 3 and 4.

[90] KDVS Reply Comments at 3-4.

[91] *NOI* at Appendix B, Table 4.

children are in the television audience throughout the broadcast day and night. As previously noted, available data show that children, particularly those between the ages of 12 and 17, are in the viewing audience until the last time period reported for television ratings. The data further show that as high a percentage of children ages 12 to 17 as adults watch television during the late evening hours. Indeed, for the 1:45 to 2:00 a.m. time period, one commenter has estimated that there are over 970,000 12 to 17 year olds in the television audience.[92] These figures, of course, do not take into consideration the number of children who may be using VCRs between midnight to 6 a.m. to record television programs for viewing at a later time.

67. The data further show that a significant number of children in the broadcast audience are not subject to active parental supervision, even during the late evening and early morning hours. Although Broadcasters have submitted a study alleging that many children are under "parental supervision" at all times of the broadcast day, the study does not establish that parents in fact actively supervise their children's viewing and listening of radio and television; rather, it shows only that most children are usually in the "presence" of an adult, an undefined term that leaves open the possibility that children may be watching or listening to a television or radio while their parents (or other adults) are in other parts of the house or are asleep. The record, moreover, indicates that children engage in unsupervised viewing and listening throughout the day and night not because of a lack of concern by parents, but because of the im-

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[92] Salem Reply Comments at 65.

practicality of total supervision that derives from a combination of the technology involved and the lack of available and effective parental control devices.

68. In sum, the evidence establishes that, given the pervasiveness and accessibility of radio and television, unsupervised children in pursuit of entertainment need be neither "enterprising" nor "disobedient" to turn on a television or radio, or to record a program on a VCR, at any time of day or night. Accordingly, we conclude that there exists a reasonable risk that a sufficient number of children are in the broadcast audience at all times to warrant narrowly-tailored government regulation of indecent broadcasting aimed both at facilitating parental supervision and promoting the well-being of youth. Such regulation is particularly necessary since, as previously discussed, a wide range of sexually explicit and patently offensive material may be encompassed within the definition of "indecency." [93]

E. Alternatives to 24-Hour Prohibition

69. The *NOI* solicited comment on alternatives to a 24-hour prohibition, including (1) channeling indecent broadcasts to a time of day when children most likely will not be exposed to them; (2) using program rating codes or pre-broadcast warnings to protect children; and (3) relying upon broadcast technologies to limit children's access. After careful consideration of the record, we conclude that none of these options can effectively advance our interest in protecting children from indecency and, accordingly, that a 24-hour prohibition is the most narrowly tailored means of serving this compelling government interest.

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[93] *See* ¶¶ 19-21, *supra*.

1. Time Channeling

70. Time channeling would establish a specific time period during which non-obscene, but indecent adult-oriented programming could be aired. The feasibility of this alternative depends on whether indecent broadcasts could be channeled to hours when it is unlikely that children would be in the audience. We conclude that, based on the data indicating that there is a reasonable risk that children are present in the viewing and listening audience at all times, there is no time when the reasonable risk of children in the audience is sufficiently low to make their exposure to indecent programs unlikely. Accordingly, we conclude that it would not be possible for broadcast stations, as a general matter, to channel indecent material to certain times of the broadcast day without risk that a significant number of children will be watching or listening without meaningful parental supervision.

71. Broadcasters argue that channeling broadcasts to times of day when parents have an opportunity to supervise their children gives parents a meaningful opportunity to prevent children's access to indecent programs.[94] A 24-hour prohibition, argue Broadcasters, places government in the position of deciding what children should see and hear.[95] KDVS suggests that the Commission implement time channeling during school days, when there is a reduced risk that children would be in the broadcast audience.[96] Other

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[94] Broadcasters Comments at 21.

[95] *Id.* at 23.

[96] KDVS Comments at 7-8. KDVS submits data from a 1983 Arbitron survey of the San Francisco metropolitan area showing that teens comprise one to four percent of the total television broadcast audience during the day.

parties, however, note that a number of children are alone during various times of the day.[97] In this regard, we note that *ACT I* affirmed the Commission's regulation of a daytime indecent broadcast.[98]

72. Finally, AFA argues that the effectiveness of a time channeling approach is diminished by the proliferation of VCRs, claiming that an estimated seventy-five to eighty percent of households with children have VCRs.[99] KDVS counters AFA's claim, arguing that most VCRs are purchased by parents, frequently for the personal use of their children, and that parents therefore must be aware of the possibility that their children may use VCRs to tape broadcast programming.[100]

73. After further consideration of time channeling, we conclude that we cannot identify a time when the reasonable risk of children in the audience is sufficiently low to make their unsupervised viewing of indecent programs unlikely.[101] We have determined that at all times there is a reasonable risk that significant numbers of children are in the broadcast au-

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[97] AFA Comments at 36-37; Lynda Beams (Beams) Reply Comments at 8-9 and Exhibit G; Bonneville Comments at 8.

[98] *ACT I*, 852 F.2d at 1341.

[99] AFA Comments at 29. *See also* Salem Reply Comments at 63, note 92, in which Salem cites a 1990 Nielsen study showing that over 14% of VCR taping is done from 11:00 p.m. to 6:00 a.m., and over 50% of VCR recordings are made when the television is turned off.

[100] KDVS Reply Comments at 6.

[101] For this reason, we overrule the conclusion reached in the *Reconsideration Order*, 3 FCC Rcd 930 (1987), that time channeling is an effective means of controlling children's access to indecent broadcasting.

dience for television and radio. The proliferation of VCRs further undermines a channeling approach for television, for as AFA noted, a majority of households with children have VCRs that children may operate to tape a program. Clearly, many teens and even younger children know how to use the recording and playback functions of a VCR. As a result, delayed viewing on a VCR provides children with access to programs broadcast at a time when their live viewing is least likely.

74. Broadcasters' argument that stations should be permitted to channel indecent programming to times of day when parents have an opportunity to supervise their children, moreover, fails to address the impracticality of parents supervising their children's listening and viewing 24 hours a day.[102] The record in this case includes thousands of letters from parents addressing this issue and convinces us that parents who wish to exercise such supervision do not have the tools or time available to do so because of the pervasiveness of the broadcast media and the lack of effective parental control devices.[103] Although Broadcasters' study attempts to show that opportunities for parental supervision are extensive, it fails to demonstrate that meaningful parental supervision is possible as a practical matter.[104] Indeed, in view of the substantial amount of unsupervised viewing and listening by children, the number of children who are

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[102] Indeed, it appears that the most effective means for parents to actively supervise their children's listening and viewing activities is to remove all televisions and radios. This result not only is highly impractical, but also would deprive families of the many benefits of the broadcast media.

[103] *See* n.85, *supra*.

[104] *See* ¶¶ 57-64, *supra*.

without parental supervision and the factors interfering with parental ability to supervise children's viewing and listening effectively, we must conclude that time channeling would be an ineffective means of protecting children from broadcast indecency.

75. Several commenters also argue that, because the Commission's definition of indecency and its indecency enforcement policies are allegedly vague, unless a time channeling approach is adopted in lieu of a 24-hour prohibition, the threat of sanctions could deter some broadcasters from presenting programs that are not actually indecent.[105] C&M maintains that time channeling recognizes the rights of broadcasters to transmit constitutionally protected indecent speech and the rights of listeners to receive indecent programming.[106] This request for a "safe harbor" to present indecent programming reflects a belief that a broadcaster cannot determine with any degree of certainty whether a specific program violates the guidelines adopted in this proceeding. This is incorrect. Our definition of indecency, read in conjunction with our decisions in enforcement actions, provides licencees sufficient guidance to decide whether a program would be indecent.

2. Rating and Warning Devices

76. Another alternative to a 24-hour prohibition of broadcast indecency is the use of a voluntary industry ratings code for television and radio broadcasts. The ratings, which would be published in television and radio guides and announced prior to each program, would alert the viewer or listener to the content of

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[105] *See* Post Comments at 1-2; Cox Comments at 24-25.

[106] C&M Comments at 28-30.

the program. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming, since this method would require parents to actively supervise their children's listening and viewing at all hours and in all locations. The effectiveness of ratings and warnings is further reduced by random tuning behavior known as "grazing," in which viewers use television remote control or radio scanning devices to rapidly tune through the entire channel menu until they find something interesting enough to hold their attention.

77. The *NOI* requested comment regarding the use of a voluntary industry ratings code for television and radio broadcasts. However, the *NOI* expressed doubt that ratings and warnings would prevent minors from viewing or listening to indecent programming because the broadcast audience is constantly tuning in and out of programs, and suggested that random tuning behavior may be even more prevalent today than when *Pacifica* was decided in 1978.[107] The *NOI* suggested that children could be exposed to different programming in rapid succession without warning as to content either because they graze or because they are co-viewing with others who are grazing.

78. Several commenters address the possible use of ratings and warning devices. USCC and KDVS suggest that a combined time channeling and ratings system could be effective.[108] However, AFA and Salem

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[107] *NOI* at 8363 and n.44. The *Pacifica* Court noted, "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 738.

[108] USCC Comments at 6; KDVS Comments at 1.

suggest that ratings require parental supervision in order to be effective.[109] Other commenters fear that an indecency warning could attract children to a particular broadcast [110] or that a warning could serve to "license" an indecent broadcast by warning the viewer of content.[111] Several commenters also specifically responded to the Commission's discussion of grazing. Broadcasters submits a study conducted by Arbitron and NAB of 13,000 radio listeners aged 12 and over showing that this group listened to an average of 2.99 radio stations per week.[112] Broadcasters concludes that this study indicates that neither adults nor children engage in significant random tuning for radio. Pacifica claims that radio listeners, especially those who listen to noncommercial radio stations, do not engage in grazing.[113] On the other hand, others contend that grazing is prevalent.[114]

79. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming. Currently there is no device which would permit a parent to "lock out" programming. Unless it were practical for parents to supervise viewing at all times, a child may ignore a warning and view or listen to indecent programming. Indeed, a warning may attract a child's attention and lead the

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[109] AFA Comments at 46; Salem Reply Comments at 72.

[110] Beams Reply Comments at 10; Salem Reply Comments at 72; AFA Comments at 46.

[111] MIM Reply Comments at 30.

[112] Broadcasters Reply Comments at 9, n.17.

[113] Pacifica Comments at 21-23.

[114] AFA Comments at 44-46, n.65; Salem Reply Comments at 72, n.105; MIM Reply Comments at 35-36.

child to view or listen to the program. This is of particular concern because of the significant amounts of unsupervised viewing and listening by children. We also believe that grazing is sufficiently common to reduce the effectiveness of ratings, even if a child is supervised. Grazing and channel changing by either a parent or a child may cause the viewer or listener to miss a content warning.[115] We believe the study cited by Broadcasters indicating the average number of radio stations listened to per week is not relevant in determining whether grazing occurs. Grazing involves turning to a number of channels in a short period of time, and such rapid switching may not be reflected in ratings. Broadcasters do not state whether the study asked listeners if they engaged in grazing to find those channels, or if they ever engaged in grazing. Therefore, we conclude that lack of parental supervision, coupled with the proclivity of viewers and listeners to graze, would undermine the efficacy of a system of ratings and warnings.

3. Broadcast Technologies

80. The *NOI* requested comment on whether there are feasible broadcast technologies that could restrict children's access to indecent broadcasts. We conclude that although such technology may be feasible, no such technologies are currently available to the public for this purpose.

81. The *NOI* suggested that the FM or television aural subcarrier could be used for the broadcast of

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[115] We note that the broadcast in question in *Pacifica* was heard by a man while driving with his young son, and that the parent apparently missed the warning aired before the broadcast. *Pacifica*, 438 U.S. at 730.

audio indecency. The subcarrier signal would be receivable only by special decoders. Salem supports the *NOI*'s assessment that subcarriers could be used to provide audio indecency. Salem maintains that an FM station could install a subcarrier signal generator at minimal expense, and that decoders for home use currently cost approximately $60, but could be expected to fall in price if produced in large quantities.[116] John W. Olivo, Jr., suggests use of a signal that would permit electronic blocking of programs by home receivers. KDVS, however, suggests that alternative broadcast technologies may not be financially feasible for many broadcasters, particularly noncommercial stations.[117]

82. As another alternative, NRB suggests that the Commission permit the broadcast of scrambled indecent material at any hour.[118] Kennedy Broadcasting ("Kennedy") similarly suggests that low power television (LPTV) stations be permitted to offer adult-oriented programming if scrambled. NRB and Kennedy argue that the decoder necessary to view scrambled programming would protect children from indecent material in much the same way as a cable lockbox or parental key. Kennedy also asks the Commission to state whether indecency standards will be applied to subscription television.

83. With respect to scrambling, we noted our previous statements that we do not impose regulations regarding indecency on encrypted services, such as subscription television, that lack "the indiscriminate access to children that characterizes broadcasting."

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[116] Salem Reply Comments at Appendix 18.

[117] KDVS Reply Comments at 7.

[118] NRB Reply comments at 13.

Video 44, 3 FCC Rcd 757, 760 n.2 (1988), *rev. on other grounds sub nom. Monroe Communications Corp. v. F. C. C.*, 900 F.2d 351 (D.C. Cir. 1990). While signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today, so we cannot rely on these technologies either to protect children from exposure to indecent broadcasts or to assist parents in supervising their children's viewing and listening. Use of a signal as suggested by Olivo also is not available today nor expected to be available in the forseeable future, and may or may not prove practical. However, we encourage interested parties to continue to bring to our attention technologies or other means capable of restricting access by children to indecent broadcast programs.

F. Non-Broadcast Alternative Programming Sources

84. We recognize that we must be sensitive to the concern of the Supreme Court that the adult population not be reduced to seeing or hearing only what is fit for children.[119] In *Pacifica*, the Supreme Court recognized that non-broadcast alternatives to broadcast indecency are available to adults, including tapes, records, theaters and nightclubs. The *NOI* requested

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[119] *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In striking down a state statute that prohibited the sale to adults as well as to children of books "tending to the corruption of the morals of youth," the Court held that the statute was not reasonably tailored to its expressed purpose, in this case, a book arguably within the prohibited category was sold to an adult, and the Court stated that the effect of the statute was to reduce adults to reading only what is fit for children.

comment on whether these non-broadcast alternatives, including cable with a lock-box capacity, videocassettes, audiocassettes, and motion pictures, provide adults with access to visual and audio programs functionally equivalent to those that could be proscribed from broadcast. We noted that cable television, a non-broadcast alternative not mentioned by the *Pacifica* Court, provides adults with access to programming designed for mature audiences yet incorporates equipment that facilitates parental control over the viewing of their children. Several commenters agree with the Commission's assessment that adults have many alternative sources of indecent material.[120] AFA submits an analysis of the MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987, through January 12, 1990, and claims that 663, or 51%, were R-rated.[121]

85. In response, Broadcasters argues that total suppression of indecent material in the broadcast medium would deprive adults of their ability to receive protected material, and thereby would violate their First Amendment rights,[122] because much material that might be indecent either is not available elsewhere or could be found only with time or effort. Broadcasters also claims that live radio and television talk shows, special news reports, public affairs programs, and many made-for-television entertainment

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[120] *See* Bonneville Comments at 8-9; AFA Comments at 49-52; AFA Reply Comments at 34-36.

[121] AFA Comments at Appendices 4 and 5. In addition, Appendix 3 lists over 200 titles of videotapes available through sexually-oriented magazines.

[122] Broadcasters Comments at 6. *See also* PEN Comments at 8-9.

programs are not available elsewhere. Broadcasters maintains that at least seven of the broadcast programs that triggered Commission action in 1989 contained material that was unavailable in any other medium.[123] Even if some material is available, Broadcasters asserts, many adults will be deterred from obtaining the material because they will have to determine if the material is available and then purchase it. Furthermore, the timeliness of the material will be lost and, with it, a large measure of at least some of the programs' value.[124] Broadcasters also argues that adults' ability to purchase indecent material is irrelevant constitutionally because the Supreme Court has "made clear that free speech may not be 'abridged on the plea that it may be exercised in some other place.' " [125] Broadcasters also claims that "every decision cited in the long history of this proceeding, whether in broadcasting, cable, telephone, or print, unhesitatingly concluded that blanket bans on indecency violate the First Amendment." [126]

86. We conclude that a 24-hour prohibition on broadcast indecency will not, in the words of the *Pacifica* Court, "reduce adults to hearing [or seeing] only what is fit for children." [127] The Court specifically referenced *Butler* in affirming the Commission's

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[123] Broadcasters Reply Comments at 3. Six of the broadcasts mentioned by Broadcasters consisted of radio talk shows, and the seventh included a live telephone conversation.

[124] Broadcasters Comments at 8-9.

[125] Broadcasters Comments at 9, citing *Schneider v. State*, 308 U.S. 147 (1939).

[126] Broadcasters Comments at 9-10.

[127] *Pacifica*, 438 U.S. at 750 n.28.

action in *Pacifica*, noting that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubes to hear these words," 438 U.S. at 750 n.28. *See also* 438 U.S. at 760 (Powell, J., concurring). Thus, the Court has recognized that the opportunity to obtain access to indecent material through other outlets is sufficient even if those outlets are not absolutely fungible with broadcasting.

87. In addition, indecent material is available on media that are largely indistinguishable, from the viewer's perspective, from broadcast television, although their characteristics facilitate restricting access to adults. Parties do not question that adults can obtain indecent material through cable television, wireless cable,[128] home satellite dishes,[129] or satellite master antenna television systems (SMATV)[130] and, soon in the future, DBS.[131] We note, for example, that as of July, 1990, 53.9 million households, or 58.6% of the total television households, subscribed to cable, and 71.3 million television households were

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[128] "Wireless cable" is a relatively new service that provides multiple channels of video entertainment and informational programming using microwave frequencies and special reception equipment. Currently there are 50 or more systems operating in the United States, and numerous additional systems are planned. *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, MM Docket 89-600 at 53 (released July 31, 1990, FCC 90-276).

[129] An estimated 2.8 million home satellite dishes are in use. *Id.* at 55.

[130] Approximately 500,000 viewers subscribe to SMATV service. *Id.* at 57.

[131] *See Id.* at 56.

passed by cable.[132] The individual who seeks indecent material via cable television need not leave his or her home to obtain the material. Furthermore, through the use of a lock-box or parental key, parents can control children's viewing, even permitting children to view indecent material if parents believe that doing so is in a child's best interest. AFA in its comments demonstrates that a significant number of R-rated movies are shown on cable. Accordingly, imposition of a 24-hour prohibition on broadcast indecency will not significantly interfere with the ability of adults to view or listen to indecent programming.

88. Moreover, *Butler* does not address the situation presented here, in which there is no feasible way to offer adults access to the medium without offering access to children. *Butler* concerned the sale to *adults* of books "tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth." 352 U.S. at 381. Distributors of books or other media such as magazines, movies, and video and audio cassettes, with a salesperson behind the counter, have the means to control access by children at their point of sale or access. Thus, in the words of Justice Powell, "dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it." *Pacifica*, 438 U.S. at 758 (Powell, J., concurring). Broadcasting, however, has no salesperson behind the counter or lockbox which parents may use to control access. Unlike other media, broadcasting is delivered directly into the privacy of the home and does not distinguish among recipients. Accordingly, "such a physical sepa-

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[132] *See Broadcasting*, July 16, 1990, at 94.

ration of the audience cannot be accomplished in the broadcast media. . . . [T]he broadcaster cannot reach willing adults without also reaching children." *Id.* at 758-759. *Butler* simply does not address the conflict between adults' right to obtain indecent material and the need to protect children from exposure to such material in the broadcast medium. We believe, however, that the established compelling interest in protecting children, coupled with the impossibility of separating children from adults in the broadcast audience, must outweigh the right of adults to view or to hear broadcast indecency, especially when adults can readily see or hear such material on widely available and readily accessible media which can separate children and adults. As Justice Powell said, *Butler*'s attentiveness to adults' rights "is not sufficiently strong to leave the Commission powerless to act" to control broadcast indecency. *Pacifica*, 438 U.S. at 760 (Powell, J., concurring).

G. Enforcement

89. The foregoing demonstrates that only a 24-hour prohibition would effectively serve to protect children from broadcast indecency. Nonetheless, although audience surveys and data demonstrate the likelihood that significant numbers of children may be found in broadcast audiences at all times of the day and night, in the future we will consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that the data concerning children's viewing or listening are not applicable in its specific market. In other words, we will permit the broadcaster to submit evidence illustrating that only "a few of the most enterprising and disobedient young

people" are in the broadcast audience in the station's market at the time of the broadcast in question. In this regard, stations will not be required to show that children were not in the market audience on the specific date and at the specific time that the allegedly indecent program was aired (*e.g.*, Thursday, July 12, 1990 at 11:30 p.m.). Rather, stations will be permitted to demonstrate through ratings data or other probative evidence that children typically are not in the audience on the day and at the time in question (*e.g.*, Thursday nights at 11:30 p.m.). This policy will ensure that enforcement of the broadcast indecency statute will be narrowly tailored to situations in which there is in fact a risk that children are in the audience. We do not believe this requirement is unduly burdensome for a licensee.[133]

90. We note that in several prior instances, parties have responded to Letters of Inquiry or Notices of Apparent Violations with data which, they argue, demonstrate that few or no children were likely to have been listening to their particular station when the alleged indecent language was aired. Listeners and viewers, however, often switch indiscriminately from station to station and, particularly in the case of radio, "tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content." *In re Pacifica*, 2 FCC Rcd at 2701, citing *Pacifica*, 438 U.S. at 760 n.2 (Powell, J., concurring). As a result, if children in a given market are in the broadcast audience, they

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[133] We note that broadcast licensees are obligated to know and to serve the special needs of children, *see Children's Television Programming*, 55 R.R.2d 199, 214 (1984), and as a result, they appear to be uniquely able to demonstrate that children are not present in the listening or viewing audience.

may well tune into a particular station when "grazing" through different channels on their radio or TV set. Accordingly, to ensure that children are not exposed to indecent programming, we will require a station defending against a broadcast indecency complaint to demonstrate that children in fact are not in the broadcast audience for the entire market, not just the particular station, at the time it aired the allegedly indecent material.

IV. CONCLUSION

91. Based upon the information contained in the record and discussed in this *Report*, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in *Sable*, we conclude that the 24-hour prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in *ACT II*, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the *NOI*, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties wished to address. Over 92,500 comments have been received in response to this *NOI*, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been

affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the compelling governmental purpose of protecting children. Adults, on the other hand, have means to access such material should they so desire.

93. To comply with *Sable's* requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions are taken only against those stations that broadcast indecent material when children are in the audience.

V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED, That the late filed reply comments of AFA ARE ACCEPTED.

95. IT IS FURTHER ORDERED, That upon release, the General Counsel IS INSTRUCTED to submit this *Report* to the U.S. Court of Appeals for the District of Columbia Circuit in response to the remand of the record in *Action for Children's Television v. F.C.C.*, No. 88-1916.

96. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed formal comments:

1. Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBS, Inc., Infinity Broadcasting Corporation, Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, Recording Industry Association of America, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists (Broadcasters).

2. American Family Association, Inc. and Children's Legal Foundation, Inc., submitted on behalf of American Family Association, Advent Christian General Conference, Baptist General Conference, Catholic Center, Christian Standard, Conservative Congregational Christian Conference, Children's Legal Foundation, Assembly of God, Associate Reformed Presbyterian, Central Presbyterian Church, Conservative Baptist Association, Diocese of Eau Claire, Evangelical Free Church of America, General Association of General Baptists, International Pentecostal Church of Christ, North American Christian Convention, Wesleyan Church, General Association of General Baptists, General Conference Mennonite Church, Missionary Church, and Open Bible Standard Churches (AFA).

3. Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Board of Regents of the Univer-

sity of Houston System, Board of Trustees of the University of Illinois, Council for Public Television, Channel 6, Inc., Greater Dayton Public Television, Inc., Maryland Public Television, Milwaukee Area District Board of Vocational, Technical and Adult Education, Nebraska Educational Telecommunications Commission, The Ohio State University, Public Television 19, Inc., The Regents of the University of New Mexico and the Board of Education of the City of Albuquerque, New Mexico, St. Louis Regional Educational and Public Television Commission, The University of Nebraska, WITF, Inc., and WSKG Public Telecommunications Council, in a pleading entitled "Joint Comments of Noncommercial Parties" (Joint Parties).

4. Bonneville International Corporation (Bonneville).

5. Capital Cities/ABC, Inc. (ABC).

6. Cohn and Marks Law Firm (C&M).

7. Cox Enterprises, Inc. (Cox).

8. Marc Dyer (Dyer).

9. Evangelical Free Church of America (Evangelical).

10. Gospel Opportunities Inc. (Gospel).

11. Kennedy Broadcasting, Inc. (Kennedy).

12. Morality in Media, Inc. (MIM).

13. John W. Olivio, Jr. (Olivio).

14. Pacifica Foundation, the National Federation of Community Broadcasters, P.E.N. American Center, and Allen Ginsberg (Pacifica).

15. P:E.N. American Center, William S. Burroughs, Allen Ginsberg and Michael McClure (PEN).

16. Post-Newsweek Stations, Inc. (Post).

17. United States Catholic Conference (USCC).

18. University of California Radio Network and Station KDVS-FM (KDVS).

The following parties filed formal reply comments:

1. Broadcasters.
2. AFA.
3. American Academy and Institute of Arts and Letters statement.
4. Lynda Beams (Beams).
5. Central Communications and Electronics, Inc. (Central).
6. City Lights Booksellers & Publishers, Sandra Lee Golvin, David H. Halperin, Eileen Myles, Ron Padgett and Patrick Zale (City Lights).
7. Allen Ginsberg.
8. Barbara M. Hattemer (Hattemer).
9. Kenneth C. Hill.
10. KDVS.
11. MIM.[134]
12. National Religious Broadcasters (NRB).
13. PEN.
14. Salem Communications Corporation and Focus on the Family (Salem).

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[134] MIM also filed further reply comments.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

LETTER

June 18, 1990

Released: June 26, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Gregory P. Barber, President
Narragansett Broadcasting Company of
California, Inc.
Licensee, Radio Station KSJO(FM)
1420 Koll Circle
Jan Jose, CA 95112

Dear Mr. Barber:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On August 24, 1989, we asked for your comments concerning complaints received by the Commission alleging that portions of the "Perry Stone Show" (transcripts of which are attached) broadcast by KSJO(FM), San Jose, CA, contained indecent material. The broadcasts at issue occurred from 7:00 to 8:00 a.m. on October 19, 20, 25, 27, 28 and November 10: from 8:00 to 9:00 a.m. on November 4, and from 9:00 to 10:00 a.m. on October 31 and November 10 and 14, 1988.

Your September 21, 1989, response to our letter of inquiry concerning these broadcasts advices, for background purposes, that you discharged Perry Stone from KSJO on March 14, 1989, and immediately put into practice your decision to cease broadcasting the kind of language and "shock" humor that generated the complaints against Perry Stone's program. You also advise that you met with some of the complainants in May and June 1989 and issued a news release and a public apology with respect to the Perry Stone Show prior to any Commission inquiry regarding the matter.

You describe KSJO management's efforts, prior to Perry Stone's dismissal, to comply with Commission rulings regarding indecency, and state that management first became aware of the particular broadcasts here at issue when complainants submitted transcripts to the station in November 1988. You concede that the broadcasts in question were "tasteless" and may have been "offensive to many listeners," but in view of strong listener support for the Perry Stone Show and your uncertainty about how to apply Commission standards, you did not suspend the programming until you had determined that Perry Stone was "insufficiently responsive to program direction and could not be persuaded to satisfactorily conform to KSJO guidelines." Citing the "largely unsettled" state of the law on actionable indecency, you assert an inability, continuing into the present, to determine whether the particular broadcasts, especially those involving double entendre, violated the Commission's articulated indecency standards. In addition, based on your belief that "parents would normally be in a position to supervise their children's radio listening" before 9:00 a.m., you question whether the seven

broadcasts occurring before that hour are actionable even if they were indecent.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT*").

We find that the subject broadcasts all fit squarely within the definition of indecency quoted above. Even in the cases of double entendre, not only was the language understandable and clearly capable of a specific sexual or excretory meaning but, because of the context, the sexual and excretory import was inescapable. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon. Infinity Broadcasting*

Corp., 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, *supra*. As the broadcasts occurred during daytime hours, they are legally actionable. Indeed, in *ACT*, the Commission's application of its indecency standard to broadcasts aired between 6:00 and 10:00 a.m. was spcifically upheld regarding the broadcast at issue in *Infinity*, *supra*. With respect to KSJO's subsequent efforts to avoid the broadcast of indecent material, the Commission generally considers prompt and effective remedial action by a licensee as mitigative in determining the appropriate sanction level in an enforcement proceeding. In this case, however, we do not believe that the licensee's actions, while perhaps ultimately effective, were such as should affect the sanctions imposed for the broadcasts cited in this letter. Your letter states, for example, that the specific incident that triggered Stone's suspension was unrelated to the Commission's indecency policies.

Thus, it appears that on the above-referenced dates in October and November 1988, at the times stated, Station KSJO(FM) violated 18 U.S.C. § 1464 by airing indecent programming at times when there was a reasonable risk that children may have been in the audience. Accordingly, pursuant to Section 503(b) of the Communications Act. Narragansett Broadcasting Company of California, Inc., is hereby advised of its apparent liability for a forfeiture of twenty thousand dollars ($20,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced,

or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on June 7, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Attachments
cc: Peter D. O'Donnell, Esq.

Radio Station KSJO-FM, San Jose, CA
The Perry Stone Show 6:00 to 10:00 a.m.
Tape #1 Side "A"

1. 10/25/88 7:00-8:00 a.m.

CA: Caller
PS: Perry Stone
CA Hello
PS Sophie, baby.
CA What do you want?
PS Sophie baby, I love 'ya. You know how much I love you?
CA I love you too, Perry.
PS You know how much I appreciate you?
CA What do you want?
PS I love you. I'd love to, I'd love to lick the matzo balls right off your butt. As a matter of fact, I'd put it right there in the middle.
CA Perry, you didn't get enough sleep last night. That's why you're talking like this.
PS I'd like to have a smorgasbord in your butt. I'd like to have matzos in there with borsch, everything. I'd just have a buffet.
CA You wouldn't find your way out, darling.
PS I know that.

2. 10/20/88 7:00-8:00 a.m.

Song: To the tune of the "Beverly Hillbillies" theme.

Come a listen to story about a man named Boas, a poor politician that barely kept his winky fed, then one day he's pokin a chick and up from his pants came a bubbling crude. Winky oil. Honey pot. Jail bait. Well, the first thing you know, old Roger's doing jigs. Some kin folks said, "Rog, move away from there." Jail bait is the place where I really want to

be. So he loaded up his winky and he did it with Beverly. Big breasts. Only 15 years old. Going to jail. Well, now it's time to say goodbye to Boas and his friends and they would like to thank you folks for kindly dropping in. You're all invited back to this jail serenity and hope you bring some chick called Dorothy.

Radio Station KSJO-FM, San Jose, CA
Tape #1 Side "B"

3. 11/4/88 8:00-9:00 a.m.
   11/10/88 9:00-10:00 a.m.

Song: Sore Pussy

My pussy cat was scratching out on the back door, scratched so long, poor pussy got sore. Sore pussy, sore, pussy, just a friendly little cat. Friendly little cat. My pussy cat was sitting out on the front step, sat so long poor pussy got wet. Wet pussy, sore, wet, pussy, just a friendly little cat. Friendly little cat. My pussy cat was playing out on the back lot, played so long, poor pussy got hot. Hot pussy sore, wet, hot, pussy, just a friendly little cat. Friendly little cat. My pussy cat was rocking in the rocking chair, rocked so long he lost his hair, bald pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor and I, out at the clothes line, I said to my neighbor, won't you look at mine, my pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor sold my kitty but I did see. I said to my neighbor set my pussy free. Free pussy, sore, wet, hot, bald, free, pussy, just a friendly little cat. Friendly little cat. Here kitty, kitty, kitty, kitty, ahhh, nice pussy.

4. 11/10/ 7:00-8:00 and 9:00-10:00 a.m.
11/14/88 9:00-10:00 a.m.

PS All right, we got one contestant hanging on the line and play my three bongs, if you want. If you want to participate. 408-575-1800 from ninety-two three. KSJO.

Music Coming soon. S and M Pictures presents, Pecker, Pecker, it's hiding in the bush. Pecker, he's hiding in your pants, waiting to come out. (music) Listen to me. Chief, it's Pecker, it's coming. Pecker is getting bigger all the time and once it becomes big, it's going to be hard to stop it. Stop spanking the monkey, this is serious. This Pecker, he's dangerous. Arghh. Woody Woodpecker is back but this time he's really peeved. He's a peeved Pecker who had a piper pick. No. Pecker is coming. Whew. God, I'm lonely. Hey, what's that crawling up my pants? (music) Oh. Oh. (unintelligible) Oh. I just simply love cleansing myself. Oh, Jesus this is beautiful, au naturel, oh, I think I've dropped the soap. Let me bend over here. What's that? Something feels strange on my back. What is that? (music) Oh. Oh. This Pecker is long and hard and waiting to pounce from the bush. This weekend, check it out.

Radio Station KSJO-FM, San Jose, CA

5. 10 27 88 7:00-8:00 a.m.

PS Contestant number two, you're on the air. Identify yourself.

CA I'm Eric.

PS Yes.

CA From Campbell.

PS Yes, Eric.

CA You know what relative humidity is?

PS Relative humidity? What?

CA It's the sweat running down your sister's back when you're doing her doggie style.

PS Ohhh.

6. 10 28 88 7:00-8:00 a.m.

PS Christian Blasey, the third. And classical music lovers, through this limited time offer, you can have the world's best loved classics performed by the original composers but with one exception, these true classics are performed in complete fellatio. You get Bach.

FV Ohh. Oh, yeah, you're what I've been looking for

PS The immortal Chopin.

FV Oh. Oh. Oh. You like that baby, oh yeah.

PS Yes, these timeless classics are performed in true Dolby stereo with complete fellatio. You can surround your entire living room with fellatio movements. You and your family will lick their lips just waiting for fellatio. Order today and get a free Beethoven bib.

FV Oh, yeah, you really like that don't you baby.

Radio Station KSJO-FM, San Jose, CA

7. 10 31 58 9:00-10: a.m.

PS Perry Stone

MV Male Voice

FV Female Voice

PS All right man. Thank you.

MV When you were born maybe your parents were just too lazy. Now that you're all grown up and you're a healthy American male you have to suffer the consequences.

FV Ohh, it's an uncircumsized one. Ohh, how gross.

MV Yes, over 65 million healthy American males suffer from uncircumsized ones. Unlike normal men, uncircumsized males have to constantly worry about pulling back their foreskins every time they use it. Now, you, don't have to worry again because Rodgo proudly presents the foreskin garage opener. It's a computer chip that fits snugly on the tip of your thing and included is a remote control that you keep in your pocket. You use it just like a garage opener. Open it up when you have to use your thing. (Mechanical sound effect) Watch the foreskin get pulled back in a comfortable, relaxed fashion. Now, you're ready for some serious pounding. (Metal hammer sound effect). So, never worry again about foreskin. Pick up Rodgo's new foreskin garage opener. You'll be glad you did.

MV Oh, wow, I think she's ready to do it. Hey, you ready to do it? Yeah, I think she's ready to do it. (Mechanical sound effect).

FV Yeah. Oh, yeah, you are.

MV Thank you foreskin garage door opener.

8. 10 19 88 7:00-8:00 a.m.

MV Oh, this one is for you Trish. If I had a rooster and you had a donkey and your donkey ate the feet off my rooster, what would you have?

TB I don't know. What would I have?

CA Two feet of my cock in your ass. (music payoff) (laughter).

PS Of course, we're speaking about those farm animals again, just so we can clear it up.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of PACIFICA FOUNDATION, INC.
d/b/a PACIFICA RADIO
Los Angeles, California

Licensee of KPFK-FM
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1987 Released: April 29, 1987

By the Commission: Commissioner Quello concurring and issuing a statement.

1. The Commission has before it two complaints with respect to certain programming aired on KPFK-FM, Los Angeles, California, alleging violations of Title 18, United States Code, Section 1464. Under Section 503(b)(1)(D) of the Communications Act, the Commission has authority to impose a forfeiture or other sanction upon a licensee who has violated Section 1464. At issue is whether the broadcasts constitute a violation of Section 1464, and if so, what penalties, if any, should be imposed upon licensee Pacifica Foundation, Inc. for such violations.

I. BACKGROUND

2. On July 10, 1986, and on September 8, 1986, the Commission received complaints that certain programming (more fully described below) aired on Station KPFK-FM, Los Angeles, CA, violated Title 18, United States Code, Section 1464. That section of the United States Criminal Code provides that: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

3. More specifically, on July 10, 1986, the Commission received a complaint alleging that on June 28, 1986, at approximately 7:45 p.m., local time, KPFK-FM aired a program entitled "Shocktime America" ("Shocktime, U.S.A.") which allegedly contained a narration and song lyrics utilizing words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A." The complaint did not include a transcript or tape recording of the show, and did not indicate whether the use of the expletives described was repetitive.

4. On September 22, 1986, the Chief, Mass Media Bureau sent letter to Mr. Jack O'Dell, the Chairman of Pacifica Foundation, Inc., enclosing the above-described complaint letter and asking for Pacifica's comments. On October 21, 1986, the Commission received Pacifica's response. In that response Pacifica indicates that "Shocktime, U.S.A." is a live KPFK program that is produced by a Los Angeles-based performance art group. On the particular program in question, Pacifica indicates that one of the group's members made remarks that were not scripted and which members of the listening audience might well have found offensive. Furthermore, Pacifica asserts

that as a result of this incident the other members of the group met and expelled the subject individual. Additionally, the licensee indicates that the program producers, in recognition that "the nature of this spontaneous commentary was so inappropriate," withdrew the program from KPFK. Pacifica expresses regret for the incident and states that it has reemphasized to all program producers their responsibility to the station and to the listening audience.

5. On September 8, 1986, the Commission received a complaint alleging that on Sunday, August 31, 1986, between 10:00 and 11:00 pm. local time, KPFK aired a program "I Am Are You?" ("IMRU") that featured excerpts from a play entitled "Jerker." The complaint alleged that these excerpts involved dramatic readings of sexual fantasies and contained language highly descriptive of sexual and excretory activities.

6. In its September 22, 1986, letter to Pacifica, the Chief, Mass Media Bureau also enclosed this complaint and asked for the licensee's comments. In its response, Pacifica states that the program "IMRU" is a regularly aired program directed to the gay population of Los Angeles. Pacifica represents that the play, "Jerker," deals with the issue of Acquired Immune Deficiency Syndrome and that the mood of the play is "the need to affirm life in the face of death." Pacifica contends that the complaint provided no context to the complained-of words and phrases and was, therefore, misleading. In an effort to comply with Commission advice in earlier decisions,[1] the following warning was broadcast prior to the commencement of "IMRU" on the night in question:

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[1] *See, e.g., Pacifica Foundation*, 56 FCC 2d 94, 99 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

> The Supreme Court of the United States has directed that broadcasters must be especially aware of the effect of the use of so called "indecent" language during the hours when childern may be listening. KPFK's policy is to allow the freest possible expression consistent with that ruling.
>
> The following program contains material which some listeners may find objectionable. If you would be disturbed by the use of such sensitive material, please tune out for the next . . . . . minutes.

7. Finally, Pacifica asserts that at the time the subject program was broadcast "children would not ordinarily be in the listening audience," and that Arbitron ratings confirm that KPFK's listening audience rarely consists of children. Pacifica also supplied a tape recording of the August 31, 1986, "IMRU" program.

II. DISCUSSION

8. Our task in this matter is to determine whether or not the material aired by KPFK-FM meets the legal test for indecency as articulated by the Commission in its *Pacifica* decision and affirmed by the United States Supreme Court. *Pacifica Foundation*, 56 FCC 2d 94 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

9. In *Pacifica*, the Commission concluded that "indecent" matter proscribed under 18 U.S.C. Section 1464 is not identical to "obscene" matter, 56 FCC 2d at 97-98. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court found that the standard for obscenity is: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient

interest; 2) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

10. In *Pacifica* we found that indecent speech involves the description or depiction of sexual or excretory activities or organs in a patently offensive manner. Indecent language was described in the Supreme Court's *Pacifica* decision as speech that is "patently offensive as measured by contemporary community standards for the broadcast medium." *FCC v. Pacifica Foundation*, 438 U.S. at 732. Further, as noted by the Court, what is indecent "is largely a function of context" and cannot adequately be judged in the abstract. *Id.* at 742. In making this determination, the Court relied upon a nuisance rationale when it affirmed the Commission, and spoke of channeling indecent speech to a time when children were not likely to be in the broadcast audience.[2]

11. When making determinations as to whether certain speech is "indecent," we recognize and rely upon the Court's holding in *Pacifica* as setting forth the legal test for indecency. We do not, however, necessarily rely upon all aspects of the rationale initially articulated in the Commission's *Pacifica* decision, as upheld by the Court. For example, we no

[2] Nuisance law generally speaks to channeling behavior rather than prohibiting it. While indecent transmissions to adults may not, in and of themselves, be unlawful, indecent transmissions to children are inappropriate. Under the nuisance rationale, channeling indecent broadcasts to times when there is not a reasonable risk that children may be in the audience avoids the inappropriate broadcast of such material to children. *See Pacifica Foundation*, 56 FCC 2d at 98; *see also FCC v. Pacifica Foundation*, 438 U.S. at 749-51.

longer consider the argument of spectrum scarcity to provide a sufficient basis for this type of regulation. Rather, we rely upon and emphasize the continued validity of the nuisance rationale articulated by the Commission and endorsed by the Court. Furthermore, we do not believe that any purported diminished First Amendment rights of broadcasters justify more expansive restrictions than would apply to other media. On the contrary, restricting indecency in broadcasting is required by law, and we believe that the restrictions we apply herein are consistent with the First Amendment protection applicable to the print media.

12. As to the parameters of indecent material, the licensee of KPFK-FM argues that the holding in *Pacifica* limits a finding of indecency to deliberate, repetitive use of the seven words actually contained in the George Carlin monologue determined to be indecent in *Pacifica*. While Commission action subsequent to the *Pacifica* decision may have indicated this to be the Commission's position, we take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future. We find that the definition of indecent broadcast material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in *Pacifica*. Those particular words are more correctly treated as examples of, rather than a definitive list of, the kinds of words that when used in a patently offensive manner as measured by contemporary community standards applicable to the broadcast medium, constitute indecency.

13. While speech that is indecent must involve more than an isolated use of an offensive word, *see*

Pacifica Foundation, 95 FCC 2d 750, 760 (1983), repetitive use of specific words or phrases is not an absolute requirement for a finding of indecency. If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. Rather, speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium. The mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.

14. It has long been held that the government may impose reasonable time, place and manner restrictions on speech,[3] so long as they are narrowly tailored to further a significant government interest. *Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). The

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[3] Our regulation of indecent speech is a valid time, place and manner restriction because our objective is not to proscribe the expression of any particular type of protected speech. Rather, our purpose is to promote the content-neutral and significant governmental interest in safeguarding the well-being of the nation's youth, while preserving the ability of adults to receive the material during the times of day when there is not a reasonable risk that children may be in the audience. *See generally Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986).

time, place and manner restrictions that are constitutionally permissible will necessarily vary, however, based on the characteristics of the medium involved. Because of the physical characteristics of the print medium, it is easier to restrict the access of minors to indecent material by, for example, instituting a reasonable requirement that such material be placed behind store counters or under opaque covers and preventing its sales to minors. Movie theaters can likewise close their doors to minors. In these cases, children's access can be limited without affecting adult access.

15. This physical separability of adults from children, however, is generally not available in broadcasting. Broadcast material is available to anyone who has a radio or television. Accordingly, the only effective means of restricting the access of minors to indecent programming is to channel such programming to a time during which there is not a reasonable risk that children may be in the audience. Hence, it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling of indecent material. Indeed, we believe that requiring indecent programming to be broadcast only at a time when there is not a reasonable risk that children may be in the audience is a reasonable and narrow time, place and manner restriction that is consistent with the same First Amendment protections afforded the print media.

16. In prior determinations related to the broadcast of indecent material, the Commission has indicated that such broadcasts may be legally permissible if they are aired after 10:00 p.m. and are preceded

by a warning.[4] Current evidence concerning the presence of children in the broadcast audience, however, warrants a reevaluation of this position. Our evidence indicates that there is a reasonable risk that children are still in the audience at 10:00 pm, at least on weekends (when the program "IMRU" was aired).[5] Although the percentage of children in the audience declines as the evening hours progress, significant numbers of children remain in the audience on Sunday evenings as late as midnight. Studies indicate that approximately 112,200 children aged 12-17 are in the Los Angeles metro survey area radio audience per average quarter hour between 7 p.m. and midnight on Sunday night. *Arbitron Ratings-Radio*, Los Angeles, Fall 1986, Metro Survey Area, Sunday 7:00 p.m.-Midnight, Average Quarter Hour Estimate, Teens. Thus, we have determined that mechanistically relying on a specific time for broadcasting indecent material no longer satisfies the requirement that indecent material be channeled to a time when there is not a reasonable risk that children may be present in the broadcast audience. With this standard in mind, we now address the specific broadcasts that are the subject of the complaints.

Shocktime, U.S.A.

17. It is uncontested that the June 28, 1986, edition of the "Shocktime, U.S.A." program contained

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[4] *Pacifica Foundation*, 36 FCC 147 (1964); *see also Pacifica Foundation*, 56 FCC 2d 94, 99, 100 (1975).

[5] We are here addressing the risk of children in the audience during the time frame and with regard to the market before us. Of course, indecent material could be broadcast at a time when there is not a reasonable risk that children may be in the audience.

the language at issue. However, we are unable to determine whether the broadcast was indecent within the meaning of 18 U.S.C. Section 1464, under the *Pacifica* standard, because we do not have sufficient information or evidence concerning this particular broadcast upon which to make a fair determination of indecency. The complainant has merely stated that four specific phrases were used during the course of the broadcast. Without additional information, we cannot determine precisely the context or whether the use of patently offensive speech was isolated.[6] Thus, we have no basis upon which to make the requested determination as to indecency.

18. Furthermore, given the circumstances under which the material at issue was aired (*i.e.*, it was live, spontaneous and unscripted), *and* the remedial action taken by Pacifica and the performance art group that produced "Shocktime, U.S.A.," even if we could determine that the broadcast was in fact indecent, we would decline to take action in this situation. The Commission has previously indicated that the isolated use of unplanned expletives during live coverage of news or public affairs programming will not necessarily be actionable so long as the licensee exercises reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts. We believe that Pacifica has followed these guidelines with respect to "Shocktime, U.S.A." Accordingly, we will take no further action with respect to the June 28, 1986 program.

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[6] The Commission has been advised that neither a tape recording nor a transcript of the program is available to provide a more detailed review of the words used, the context or the level of repetitiveness.

IMRU

19. We now turn to the "IMRU" broadcast of August 31, 1986. We have reviewed the tape of the program. That review reveals that the program commenced with an interview, by the host of "IMRU," of the director and two actors appearing in the Los Angeles production of the play "Jerker," and was followed by excerpts from the play itself. The play, which was characterized during the interview with its director, Michael Kearns, as being "blazingly erotic," concerned the telephone relationship of two men who had met accidently over the telephone, but never in person, apparently when one called a wrong number.

20. The conversations broadcast made extensive use of language that describes or depicts sexual or excretory organs or activities in a patently offensive manner. In the first of the three vignettes presented, the words "shit" and "fucking" were used repetitively. In addition, during the first vignette, one character says to the other:

> "Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking."

21. At another point, one of the characters states that he was in Vietnam and that after what he had seen there, no one could tell him that he was immoral if he loved "sucking ass," "taking piss from a guy's cock," or if he had "a quickie blow job in the Union Square's men's room."

22. As the presentation moved to the second vignette, the scene shifted to one character's description of an anonymous sexual encounter in which he had participated. He was told by the listening char-

acter to "make it hot" and to keep in mind that he would be "playing with" himself while being told the story. That story contained the following language by way of example:

> "I'll give you the gentlest fuck west of the Mississippi."
>
> "We cuddled and played around a bit before he started working on my ass."
>
> "I remember he was kneeling between my legs and he worked my asshole with lube for the longest time—just gettin' it to relax so there was no tension, no fear."
>
> "He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain."
>
> "His cock felt warm inside me—and full—so nice and full. So he began sliding his cock back and forth inside of my ass—but so gently, so gently."
>
> "I don't think I've ever had such a gentle, sensitive fuck before or after. Well, he must gone at it for twenty minutes at the very least, just slidin' his cock back and forth inside of my ass."
>
> "And then he whispered to me, 'You're gonna feel me come inside of you.' And I did. Man, I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good."

And later in the program this exchange:

> Actor 1: "You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex, you understand?"

Actor 2: "Yeah!"

1: "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like-you never have before. You get me?

2: "Hot throbbing cocks, hard pounding muscles."

1: "You've got it."

23. We believe that the material contained in the aired portion of "Jerker," of which the foregoing is exemplary but by no means exhaustive, supports a finding that the licensee broadcast indecent material within the meaning of 18 U.S.C. Section 1464. The material describes sexual and excretory activities and organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. Notwithstanding the licensee's assertion, we do not believe the context dilutes or ameliorates the patently offensive manner in which the sexual activity was described.

24. We are unpersuaded by Pacifica's argument that "KFPK's listening audience rarely consists of children except where programs are specifically focused on them." First, we would point out that the test of indecency focuses on the *risk* of the presence of children in the audience. As we have stated previously, "While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the 'intended' audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children," *Eastern Education Radio*, 24 FCC 2d 408, 411 (1970) (footnotes omitted). Second, we note the Supreme Court's observance that radio

listeners tune into a station generally without the benefit of a schedule of programs for warning as to potentially offensive content.[7] *FCC v. Pacifica Foundation*, 438 U.S. at 760 n.2 (Powell and Blackmun, JJ., concurring). Finally, we note that listeners often switch indiscriminately from station to station and are thus easily exposed to indecent material not properly channeled to a time during which there is not a reasonable risk that children may be in the broadcast audience.

25. Based upon our review of the material, we conclude that the "IMRU" broadcast falls within the ambit of indecency as prohibited by Section 1464 under the standards set forth herein. Thus, we have determined that at a minimum this material warrants restricting children's access. Given our finding that there is a reasonable risk of children remaining in the listening audience at 10:00 p.m. on Sundays, the fact that this program was broadcast at 10:00 p.m. with a warning does not render it permissible. However, because prior Commission actions have indicated that airing programs containing indecent material at 10:00 p.m. might in certain cases be permissible,[8] we

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[7] Accordingly, we do not believe a warning preceding a broadcast program is sufficient to restrict the access of children to indecent material at times of day when there is a reasonable risk that children may be in the audience. Nevertheless, we continue to expect advance warnings to be given when broadcasters choose to air indecent programming at a time when there is not a reasonable risk that children may be in the broadcast audience. *See* Regents of the University of California (KCSB-FM), FCC Rcd, FCC 87-139, fn.8. (adopted April 16, 1987).

[8] *See, e.g.*, Pacifica Foundation, 36 FCC 147, 149 (1964); see also Pacifica Foundation, 56 FCC 2d 94, 98 (1975).

hereby limit our action to warning you and all other broadcast licensees that this material would be actionable under the indecency standard as clarified today.[9]

26. We do not decide here whether, based upon the applicable local community standards, the subject material also meets the tests for obscenity set forth in *Miller*.[10] We do believe, however, that there is sufficient possibility of such a finding. We are therefore directing the General Counsel to forward the complaint and tape recording of the subject "IMRU" program to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

27. ACCORDINGLY, IT IS ORDERED, That the General Counsel shall forward the complaint and the tape recording of the subject "IMRU" program, along with a copy of this Order, to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau will send a copy of this Memorandum Opinion and Order to the licensee at its address of

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[9] The Commission has the authority to issue declaratory rulings in order to remove uncertainty in complicated areas of the law such as this, see 5 U.S.C. § 554(e), and this Memorandum Opinion and Order is intended to serve as such a ruling. Although this case addresses the particular facts herein, this decision will have precedential effect on other broadcast licensees as well.

[10] If this material is determined to meet the Miller test of obscenity based upon local community standards, the broadcast of such material would be entirely prohibited, regardless of the time of day, since it would not be constitutionally protected speech at any time.

record and to the persons who filed the complaints relating to the "Shocktime U.S.A." and the "IMRU" broadcasts.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Complaints Against Pacifica Foundation, Inc. Licensee of Station KPFK-FM, Los Angeles, CA Regarding Allegedly Obscene or Indecent Broadcasts.

In 1975, I concurred with the Commission's *Pacifica* decision stating:

> I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literacy, artistic, political or scientific value. They will note that the audience is composed of a minimum of children, and their pre-programming *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

Pacifica Foundation Station (WBAI), 56 F.C.C.2d 94, 103 (1975) (Quello concurring).

As I predicted, we are confronted with a licensee that has presented obviously indecent material, yet followed our standards for channeling so-called indecency into late evening hours. The language in the program entitled "Jerker" is patently indecent and probably obscene. I find it difficult to believe that any licensee would reasonably believe such language to be permissible under 18 U.S.C. Sec. 1464.

I always have believed myself to be a strong advocate of the First Amendment. If there were any connection between such language and free and open discussion of public issues, then I would be the first to defend its use. On matters of public importance, open and robust discussion of issues is integral to the operation of our system of government and an informed citizenry, therefore, entitled to the most exacting degree of First Amendment protection. *See e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Our founding fathers did not guarantee freedom of speech for repulsive obscene purposes. Given the language in the instant case, I must agree with Justice Stevens in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726, 746 (1978), when he said:

> These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said "such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Citations omitted.)

If the decision were mine alone, I would assess a substantial forfeiture against the licensee. I am advised, however, that the Commission's interpretation of *Pacifica* is so narrow that the language here would not fall within the scope of indecency as presently defined. I am simply astonished that the Commission has placed itself in such an "obscene" legal position.

While my preference would have been to assess a fine, I do believe today's decision takes significant steps to rectify our present situation. It should be abundantly clear that the Commission will no longer confine *Pacifica* to the facts of that case. In addition, we are directing the staff to submit this record to the Justice Department for criminal prosecution under the obscenity provisions for 18 U.S.C. Sec. 1464. This decision, together with the other decisions adopted today, will go a long way in correcting what has become an intolerable situation. Therefore, I concur.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Licensee of KCSB-FM, Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1987 Released: April 29, 1987

By the Commission:

1. The Commission has before it a complaint with respect to certain programming aired on KCSB-FM, Santa Barbara, California, which allegedly violates Title 18, United States Code, Section 1464. Under Section 503(b)(1)(D) of the Communications Act, the Commission has authority to impose a forfeiture or other sanction upon a licensee which has violated Section 1464. At issue is whether the broadcast constitutes a violation of Section 1464, and if so, what penalties, if any, should be imposed upon the subject licensee for such violations.

2. On or about September 17, 1986, the Commission received complaint alleging that on Saturday, July 26, 1986, during the course of a 9:30 p.m. music program, KCSB-FM broadcast recorded music containing indecent or obscene language. On September 22, 1986, the Chief, Mass Media Bureau sent the Regents of the University of California a letter of in-

quiry regarding this complaint. The letter specifically asked the licensee to provide any information that might assist the Commission in determining whether the program in question was obscene or indecent. The licensee responded by letter dated October 30, 1986. The materials enclosed with the letter included a copy of the KCSB-FM associate manager's report of an October 14, 1986, internal investigation into this matter. The report concluded that, according to the station's bylaws and training manual, the material broadcast, which consisted of a song entiled "Makin' Bacon," was not obscene but might be considered "profane" (a term apparently intended by the licensee to encompass the legal definition of "indecent"). The report therefore addressed the issue of when children might be listening, an element emphasized by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The report opined that "children would not be listening to the radio at 10 p.m. on a Saturday night [when the subject song was broadcast]," but indicated that in the future such material would air closer to midnight to prevent further accessibility to children.

3. The Commission is empowered to take action with regard to programming proscribed by 18 U.S.C. § 1464.[1] Under the prevailing test, indecent speech is "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[2] Such indecent speech is action-

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[1] *See* 47 U.S.C. §§ 312(a)(6), and 503(b)(1)(D).

[2] *See Pacifica Foundation*, 56 FCC 2d 94, 97 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). *See also Pacifica Foundation*, FCC Rcd., FCC 87-138 (adopted April 16, 1987).

able when broadcast "at times of the day when there is a reasonable risk that children may be in the audience." [3] Speech that is indecent must involve more than an isolated use of an offensive word. *See Pacifica Foundation*, 85 FCC 2d 750, 760 (1983). Specific words, however, need not necessarily be repeated to the same degree as were the words involved in *Pacifica*, nor do the seven words at issue in *Pacifica* provide an exhaustive list.[4] Further, what is indecent "is largely a function of context" [5] and cannot be judged in the abstract.

4. Applying these principles, we find that the lyrics of the song "Makin' Bacon" are indecent. The song as broadcast includes the following language:

> Makin' bacon, makin' bacon, makin' bacon, makin' bacon
>
> [Inaudible]
>
> A ten-inch cropper with a varicose vein
>
> Makin' bacon is on my mind
>
> Come here baby, make it quick.
>
> Kneel down there and suck on my dick
>
> Makin' bacon is on my mind
>
> Makin' bacon is on my mind
>
> Turn around baby, let me take you from behind.
>
> Makin' bacon is on my mind.
>
> With your blue, blue knickers, you look so neat.

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[3] *Pacifica*, 56 FCC 2d at 98.

[4] *See Pacifica Foundation*, FCC Rcd., FCC 87-138 (adopted April 16, 1987) ; *Infinity Broadcasting Corporation*, FCC Rcd., FCC 87-139 (adopted April 16, 1987).

[5] *FCC v. Pacifica Foundation*, 438 U.S. at 742.

Bend over baby, gonna give you my meat.
Makin' bacon is on my mind.
Get down baby on your hands and knees
Take my danish and give it a squeeze
Makin' bacon is on my mind
Makin' bacon is on my mind
Turn around baby, let me take you from behind
Makin' bacon is on my mind.

* * *

Hey baby, got something to chew
Deep throat, baby, it's good for you
Makin' bacon is on my mind.

* * *

Makin' bacon is on my mind
Turn around baby, let me take you from behind
Makin' bacon is on my mind.

5. As noted in *Infinity Broadcasting Corp.* and *Pacifica Foundation*, also decided today, prior Commission rulings have applied the *Pacifica* definition of indecency in a manner that requires clarification.[6] We find that this broadcast made several clearly discernible references to sexual organs and activities, and that these references are patently offensive as measured by contemporary community standards for the broadcast medium.[7] In addition, as we noted in

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[6] *See Infinity Broadcasting Corporation, supra* n.4; *Pacifica Foundation, supra* n.4.

[7] We note that the licensee has provided excerpts from the station's bylaws and training manual stating its belief that pre-recorded song lyrics are somehow immune from Commis-

Infinity, innuendo can be, and in this case is, rendered explicit by surrounding explicit references that make the meaning of the entire discussion clear. Although the material aired does not involve the specific seven words at issue in the *Pacifica* case, we find that it would be actionable under our clarified definition of indecency set forth today.

6. Similarly, we find that the song was broadcast at a time when there was a reasonable risk that children may have been in the audience. The Commission in the past has indicated that it might be permissible to air programs containing indecent material after 10 p.m. when accompanied by a warning [8] but, as clarified today, no such arbitrary time of day will govern hereafter.[9] Data concerning audience composition must be examined to assess the risk that children may be present. In this context, we note that a significant number of children remain in the Santa Barbara area radio audience during the time here

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sion action. We wish to take this opportunity to make it clear that song lyrics enjoy no special protection, and those licensees who choose to broadcast songs containing indecent lyrics are subject to the same regulatory standards that are applied to any other utterances made by means of radio communication.

[8] *See, e.g., Pacifica Foundation*, 56 FCC 2d 94, 98-99 (1975); *Pacifica Foundation*, 36 FCC 147, 149 (1964). We note that although station KCSB-FM broadcast "Makin' Bacon" shortly after 10 p.m., no warning was given beforehand, contrary to prior Commission guidance. *See Pacifica Foundation*, 56 FCC 2d at 99. While a warning is not sufficient to restrict adequately minors' access to indecent material, the Commission will continue to expect advance warnings to be given when broadcasters choose to air indecent programming at a time when there is not a reasonable risk that children may be in the broadcast audience.

[9] *See Pacifica Foundation, supra* n. 4.

in question according to available audience survey information.[10]

7. In light of the fact that prior rulings may have created uncertainties as to the scope of actionable indecency, we hereby warn The Regents of the University of California and all other broadcast licensees that this material would be actionable under the indecency standard as clarified today.[11] Future violations will be met with the appropriate sanctions.

8. ACCORDINGLY, IT IS ORDERED, That the Mass Media Bureau will send a copy of this Memorandum Opinion and Order to the licensee at its address of record and to the person who filed the complaint relating to the "Makin' Bacon" broadcast.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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[10] Available data indicate that approximately 1,200 children between 12 and 17 years of age are still in the radio audience per average quarter hour in the Santa Barbara area between 7 p.m. and midnight on Saturday evenings. There are approximately 4,900 children within this age group within the City of Santa Barbara itself and 27,800 in the county. *Arbitron Ratings-Radio, Santa Barbara,* Fall 1986, Metro Survey Area, Saturday 7.00 P.M. to Midnight. Average Quarter Estimate: 1980 Census of Population, California General Population Characteristics.

[11] The Commission has authority to issue declaratory rulings in order to remove uncertainty in complicated areas of the law such as this, see 5 U.S.C. § 554(e), and this Memorandum Opinion and Order is intended to serve as such a ruling. Although this case addresses the particular facts herein, this decision will have precedential effect on other broadcast licensees as well.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464.

I concur in this Report because Congress unequivocally declared that the Commission "shall promulgate regulations . . . to enforce the provisions of [section 1464] on a 24 hour per day basis." [1]

I agree completely with the Report's conclusion that our interest in helping parents control their childrens' media viewing habits is paramount. The courts have recognized that protecting the physical and psychological well-being of children is a compelling interest. *See, e.g., Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2836 (1989).

Given the vital nature of this interest, it is important to keep in mind that this Report will be subject to immediate judicial scrutiny as the pending litigation regarding the 24 hour ban resumes.[2] Thus far, the courts have never upheld a ban on indecent material for any medium, and have struck down regulations deemed to be excessively burdensome.[3] Per-

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[1] Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub.L.No. 100-459, Section 608, 102 Stat. 2186, 2228 (1988).

[2] *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (remanding issue of 24 hour ban to the Commission for "a full and fair hearing on . . . the propriety of indecent broadcasting").

[3] *E.g., Sable Communications of California, Inc.*, 109 S. Ct. at 2836-39; *Wilkinson v. Jones*, 480 U.S. 926 (1987) (*mem.*), *aff'ing*, 800 F.2d 989 (10th Cir. 1986), *aff'ing sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp.

haps for that reason, we might have gone farther in this Report to obtain empirical evidence of the viewing habits of children 12 and under.

Ever since I came to the Commission some 16 years ago, I unhesitatingly have pointed out the need to enforce our rules against those few licensees who go too far. At times in the past I felt like the only Commissioner who favored this policy. Nevertheless, I think it is important to give credit where it is due to the broadcast industry. Thus, while it may be true, as the Report points out, that theatrical presentations of certain films such as "Deep Throat" or "Debbie Does Dallas" have not been held to be obscene, it is also a fact that there has never been a threat that movies of this type would show up on free over-the-air television. Citing such hard core

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1099 (D. Utah 1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184 (9th Cir. 1989); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Carlin Communicatons, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 305 (1988) (*"Carlin III"*); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (*"Carlin II"*); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (*"Carlin I"*); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 693 F. Supp. 332 (E.D. Pa. 1988).

I think we make a case that broadcasting is a more pervasive medium than those involved in previous cases. However, congressional sponsors of the ban on indecent dial-a-porn legislation stated that "[t]elephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use," and asked, "[i]s there really a medium more 'pervasive' than the telephone?" 134 Cong. Rec. H1694 (April 19, 1988) (remarks of Rep. Bliley).

films, the Report strays far afield from the legitimate concern with broadcast indecency and runs the risk of tarring broadcasters with too broad a brush.[4] No licensee in America has ever aired the type films listed in the Report, and, to my knowledge, no licensee has ever considered doing so. Even on cable television, where courts have found a greater right to transmit such material, operators have steered clear of hard core fare except in a very few instances.[5]

Indeed, broadcasters have exhibited commendable sensitivity to issues of indecency, as befits their status as public trustees. In this regard, the Board of Directors of the National Association of Broadcasters in June issued a Statement of Principles for radio and television broadcasting. The Statement addressed various areas of programming content in order to "reflect what [the NAB] believes to be the generally-accepted standards of America's radio and television broadcasters." With respect to sexually oriented material, the Statement provided, in relevant part:

---

[4] As originally drafted, the Report even cited sex magazines, sex manuals and pornographic playing cards as examples of indecent but non-obscene materials. Such examples are irrelevant to broadcasting and wisely have been deleted from the final Report.

[5] While I understand that examples of hard core pornography were identified to illustrate the "broad range of material that . . . could be considered indecent," Report of the Commission at para. 21, it would be well for us to remember that this "broad range" encompasses programming of real merit. *See, e.g.*, Hickey, *Four Letters Spell Dilemma on TV News*, WASHINGTON TIMES, June 29, 1990 at B6 (detailing ways in which television stations modified their news coverage of the Vista Hotel sting operation in the Marion Barry drug and perjury trial).

"Programming that purely panders to prurient or morbid interests should be avoided.

Where significant child audiences can be expected, particular care should be exercised when addressing sexual themes.

Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.

All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter."

Although the Statement of Principles is advisory only,[6] such efforts by broadcasters should be recognized and appreciated.

Finally, I agree with the Report that adults who wish to view indecent material have access to such programming from other media.[7] But I hesitate to

---

[6] Unlike the NAB's Television Code, which for thirty years provided broadcasters with guidelines for meeting their statutory obligation to serve the public interest, the Statement of Principles provides no means of enforcement. The NAB unfortunately is barred from doing more by a judicial holding that the Television Code violates antitrust laws. *See United States v. National Ass'n. of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982). This decision was a disservice to the American public that I hope will be overturned by congressional action. *See, e.g.*, TV Violence Act, S. 593, which would grant antitrust immunity to allow the industry to adopt voluntary guidelines to help control depictions of violence, sexually explicit material and use of illegal drugs.

[7] Adult programming is widely available on audio and video cassettes, cable television and in theatres. But as the Commission recently concluded in our report to Congress on cable television, MMDS is currently available to only 300,000 subscribers nationwide and DBS does not yet exist. *See Competition, Rate Deregulation and the Commission's Policies Re-*

conclude that the other sources are "largely indistinguishable" from, or "functionally equivalent" to broadcasting. Report paras. 84, 87. Such a characterization tends to undermine the public interest standard that makes broadcasting unique. For if we must consider the overall media environment to gauge whether or not the public has adequate access to information, it weakens the rationale for imposing special information obligations on Commission licensees. Suffice it to say that if adults wish to go to the extra trouble of obtaining indecent programming, nothing we do today prevents them from doing so.

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lating to the Provision of Cable Television Service, MM Dkt. No. 89-600 (adopted July 26, 1990) at paras. 100, 104. Even cable is unavailable to some ten percent of television households, and approximately 43 percent to homes passed do not subscribe. *Id.* para. 3.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1916

ACTION FOR CHILDREN'S TELEVISION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENT

Before: Mikva, Edwards and Thomas, Circuit Judges

ORDER

[Filed Aug. 28, 1991]

Upon consideration of the Petitions for Rehearing filed by the Federal Communications Commission and Intervenors and the responses thereto it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1916

ACTION FOR CHILDREN'S TELEVISION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENT

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed Aug. 28, 1991]

The Suggestions For Rehearing *En Banc* filed by the Federal Communications Commission and Intervenors and the responses thereto have been circulated to the full Court. No member of the Court requested the taking of a vote. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Ruth B. Ginsburg did not participate in this matter.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-356

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entiled case, be and the same is hereby, extended to and including December 16, 1991.

/s/ William H. Rehnquist
Chief Justice
of the United States

Dated this 18th day
of November, 1991.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45184

(2)

No. 91-952

Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

vs.

ACTION FOR CHILDREN'S TELEVISION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	iii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION	3
ARGUMENT	6
CONCLUSION	16
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

CASES — Pages

Action for Children's Television v. Federal Communications Commission ("A.C.T. I"), 852 F.2d 1332 (D.C.Cir. 1988). 10, 11

Butler v. Michigan, 352 U.S. 380 (1957) 15

Federal Communications Commission v. Pacifica, 438 U.S. 726 (1978). 7, 9, 10, 14, 15

Sable Communications v. Federal Communications Commission, 106 L.Ed.2d 93 (1989). 10, 13

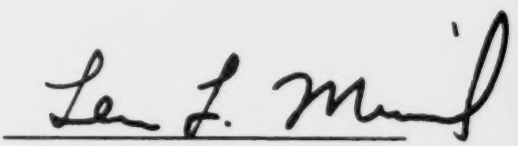
STATUTES

18 U.S.C. § 1464. . . . . 6, 10

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

National Family Legal Foundation respectfully moves for leave to file the attached brief amicus curiae. Counsel of record for Petitioner and Respondents have consented in writing to the filing of this brief.

Respectfully submitted,



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INTEREST OF THE AMICUS CURIAE

National Family Legal Foundation is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF founder Alan E. Sears was the Executive Director of the Attorney General's Commission on Pornography. In its 1986 Final Report, the Commission discussed the harms caused by the proliferation of sexual images in our society, and warned against the dangers of exposing children and unconsenting adults to pornography. Mr. Sears and the Foundation have been active in urging the

Federal Communications Commission to enforce its prohibition of indecent broadcasts. Former Attorney General Edwin Meese III, who presented the 1986 Commission report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for amicus National Family Legal Foundation.

NFLF is concerned that the decision of the D.C. Circuit mandating that certain hours of the day be reserved for indecent broadcasts will significantly increase the exposure of children and unconsenting adults to offensive pornography and profanity. NFLF believes strongly that the decision is inconsistent with prior Supreme Court indecency cases, and is not required by the First Amendment to the United States Constitution. NFLF hopes that broadcast TV and radio airwaves will remain clean, and therefore accessible and available to families and children, as they have been since the Golden Age of broadcasting.

INTRODUCTION

If the decision of the United States Court of Appeals for the District of Columbia Circuit stands, American TV and radio broadcasts will never be the same. For more than 60 years, this simple limitation has been known and accepted -- you don't talk dirty on radio and broadcast television. You can talk dirty on the street corner, in the locker room, in the movies, on record albums, and lately, even on the telephone and cable TV. But Americans have always known they could turn on the television in their living room with the children present, or flip the radio dial in the family car, without fear of being assaulted by a stream of expletives fit for a roomful of sailors. Now we are told by the D.C. Circuit that a decent family's final media refuge is required by our laws and the Constitution to permit "patently offensive depictions or descriptions of sex

or excretory functions" during certain hours of the day. In the age of trash television, where it seems every program (even the news) is designed to titillate, shock or repulse, can we doubt that broadcasts featuring full nudity of both sexes, scenes of simulated sexual intercourse complete with moaning and heavy breathing, bathroom humor, and use of "bullsh--" and "fu--", will soon be commonplace? If the FCC can draw the line only at obscenity during some time periods, is there any doubt that TV and radio executives will push right up to the edge of illegal hard-core pornography in search of higher ratings? Is this where public, family-oriented television and radio ends?

The Supreme Court should hear this case and reverse the D.C. Circuit in order to preserve broadcast television and radio as media that are available to all Americans. If television and radio continue their slide into grotesque and offensive depravity, unchecked by any sense of community standards and ignoring the consensus developed over many

years as to what is appropriate to be seen and heard on the public airwaves, concerned and responsible American families will have to make a choice: Do we allow ourselves to be assaulted in our own homes every night by graphic sex, profanity and violence, or must we turn the TV and radio off and completely give up America's primary forms of entertainment, and also our main sources for news, information and ideas from around the country and even around the world? Either way, the families of America lose.

ARGUMENT

American society has suffered a serious decline in civility over the past several decades. Common courtesy and decency seem to be relics of a previous generation. This decline can be seen in everything from minor traffic altercations that end with gunfire, to profane bumper stickers, to stadiums full of sports fans shouting vulgar slogans in unison at the officials. It is not so much that the rules of civilized conduct have changed, as it is that many members of society seem unwilling to acknowledge that any such rules exist.

There is at least one place where such rules have always existed, and that is the publicly owned radio and television broadcast airwaves. Title 18 U.S.C. § 1464 provides that "Whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than

two years, or both." This prohibition against obscene, indecent or profane language originally appeared in the Radio Act of 1927, and has been part of federal law ever since. The language is straightforward, with no suggestion that indecent or profane speech over the airwaves is acceptable at certain hours of the day.

In *Federal Communications Commission v. Pacifica*, 438 U.S. 726 (1978), this Court upheld the FCC's authority to sanction a radio station for broadcasting many of the same profane words now heard regularly on broadcast television, as is documented in the appendices to this brief. Of course, the free speech absolutists argued then that we would never be where we are now, but this Court knew better: "We are assured by Pacifica that the free play of market forces will discourage indecent programming ... the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism." 438 U.S. 744, n.19. Indeed.

The TV networks, and the ACLU and its front groups[1] will probably argue now that prime-time nudity and soft-core pornography are not the wave of the future. But already TV and radio stations are taking advantage of confusion in this area of the law. That confusion is exacerbated by judicial decisions such as the one on appeal here, decisions which refuse to take account of the rationale behind *Pacifica*. Television and radio stations have shattered one taboo after another in their search for higher ratings. We have assembled only a few examples in our appendices, but a quick glance indicates how far indecency has come in the last few years.

No one seriously argues that the government does

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[1]"Action for Children's Television" sounds better on the front end of a lawsuit than "the American Civil Liberties Union", but we have some difficulty understanding what interest children have in making patently offensive depictions of sex or excretory functions available to adults on television. Or perhaps they want children to have access to indecent programming?

not have a compelling interest in protecting children from indecent broadcasts. In an age where teen pregnancy and sexually transmitted diseases are at epidemic proportions, does it really make sense to show unedited in prime time an R–rated movie like "Private Lessons," (See Appendix "B"), in which an actress who formerly starred in a series of pornographic films spends most of the movie nude in front of the camera as she pursues a sexual relationship with a 15–year–old boy? Does it make sense to allow morning radio show hosts to entertain children preparing for school with discussions of masturbation, orgasm and penis jokes? (See Appendices "D" – "G") Does it make sense to allow PBS to broadcast nationally a documentary by black homosexuals that contains nudity and frequent uses of various permutations of the "F–word"? (See Appendix "A")

Of course not. And this Court has always recognized that the state's interest in protecting children from this type of material is compelling. *Pacifica*, 438 U.S.

749–50; *Sable Communications v. Federal Communications Commission,* 106 L.Ed.2d 93, 105 (1989). Nor can there be any real question that the types of broadcasts now occurring are "indecent" within the meaning of 18 U.S.C. § 1464. *Pacifica,* 438 U.S. 741, n.16 (nudity and "4–letter words" may be protected speech and not obscene, but their broadcast might still violate the statute). So the question is whether the means of restricting the exposure of children and unconsenting adults is "narrowly drawn" to effectuate the state's compelling purpose "without unnecessarily interfering with First Amendment freedoms." *Sable,* 106 L.Ed.2d at 105. The D.C. Circuit, without even discussing the evidence compiled by the FCC, held that banning the broadcast of indecent material was not a sufficiently narrow approach to survive First Amendment scrutiny. The court, relying on its previous decision in *Action for Children's Television v. Federal Communications Commission ("A.C.T.*

I"), 852 F.2d 1332 (D.C.Cir. 1988), summarily concluded that its holding "that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." But the evidence shows that a 24–hour prohibition on indecent broadcasts is the only means by which significant numbers of children and unconsenting adults can be protected from indecent, patently offensive broadcasts.

In its August 6, 1990 report, which was not available to the panel that decided the *"A.C.T. I"* case, the FCC examined the evidence regarding TV viewing and radio listening habits for teenagers. The FCC determined that "there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night." (¶ 65). Regarding radio listening, evidence before the FCC indicated that "in all time frames measured, a higher

percentage of all children between the ages of 12 and 17 listen to radio than the percentage of all adults age 18 and over, even between midnight and 6 a.m.", and estimated that 716,000 teenagers were listening during any time period between midnight and 6 a.m. (*Id.*) Regarding television viewing, the FCC stated in ¶ 66:

> [A]vailable data show that children, particularly those between the ages of 12 and 17, are in the viewing audience until the last time period reported for television ratings. The data further show that as high a percentage of children ages 12 to 17 as adults watch television during the late evening hours. Indeed, for the 1:45 to 2:00 a.m. time period, one commenter has estimated that there are over 970,000 12 to 17 year olds in the television audience. These figures, of course, do not take into consideration the number of children who may be using VCRs between midnight to 6 a.m. to record television programs for viewing at a later time.

If the concerns for children articulated in *Pacifica* and *Sable* are to be taken seriously, then the FCC clearly has made the case that a complete prohibition of broadcast indecency is the most narrowly tailored means of achieving the government's compelling interest. In *Sable*, this Court

invalidated the ban on indecent telephone messages for one reason -- there was no evidence to support the assertion that less restrictive means of limiting children's access would be unsuccessful:

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case, it seems to us that section 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

106 L.Ed.2d at 108.

The FCC's conclusion that nearly 1.7 million teenagers watch or listen to television or radio broadcasts during any so-called "safe harbor" time period -- whether it starts at 8 p.m., 10 p.m. or midnight -- proves only that

the D.C. Circuit's "safe harbor" is a mirage.[2] Surely this Court does not consider 1.7 million teenagers to be "only a few of the most enterprising and disobedient young people"? But that will be the result if this Court allows the D.C. Circuit's decision to stand. More than a million impressionable teenagers and preteens will be exposed each night to soft–core pornography, vulgarity and profanity.

The D.C. Circuit violates this Court's precedent in one other significant way. The decision departs from the *Pacifica* rationale for limiting indecent broadcasts by completely ignoring the interests of unconsenting adults. *Pacifica* clearly relied on the right of adults to be free from patently offensive broadcasts while flipping the radio or TV

---

[2]The FCC also received comments from The Pacifica Foundation, et al., which included a brief appendix that, if we read it correctly, shows Arbitron's percentages of children in the public radio audience at various times. Rather than refuting the FCC's numbers, the Arbitron figures, which do not reflect the majority of children who listen to commercial broadcasts, seem only to prove that no one listens to public radio.

dial (or today, the remote control.) Obviously a "safe harbor" for children, even if it were to exist, would be unsafe for unconsenting adults. Apparently the D.C. Circuit believes "the remedy for an assault is to run away after the first blow." *Pacifica*, 438 U.S. at 749.

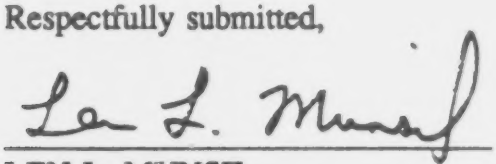
Are there available alternative means for spreading indecent recorded and videotaped messages? The better question is, what other medium does not have indecent messages? As this Court noted in *Pacifica*, those seeking indecency "may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750, n.28. Video indecency is available on cable or at the neighborhood video store, in adult bookstores, and in movie theaters; spoken or recorded indecency can still be found at the local record store or nightclub, or on the telephone. There is no serious argument that a limitation on broadcast indecency will reduce adults to hearing only what is fit for children. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

CONCLUSION

Profanity, vulgarity and nudity have existed for hundreds of years, and obviously were around at the birth of radio and television. Yet we have lived in America for decades without allowing patently offensive broadcasts over the public airwaves. Despite the cries of censorship from those who brought this lawsuit, did free speech really suffer for all those years just because you couldn't say "motherf---er" on the radio, or show a striptease in place of the Sunday night movie? The forces of incivility, rudeness, and offensiveness have soiled virtually ever corner of society — can we not leave the public airwaves to decent men and women and families, who are trying despite the odds to raise responsible young citizens in an indecent world? Congress thought so, and this Court's prior cases say so. Only allowing the FCC to prohibit indecent

broadcasts around the clock will settle this area of law and prevent court challenges to the FCC's enforcement decisions from recurring. For the sake of America's families, the National Family Legal Foundation urges this Court to grant certiorari and reverse the decision of the D.C. Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae National Family Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 15th day of January, 1992, to:

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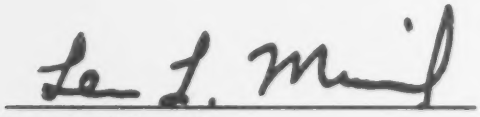
All Parties required to be served have been served.



Len L. Munsil
Counsel for Amicus Curiae

Appendix "A"

"TONGUES UNTIED"

These transcripts are taken from a recording of *Tongues Untied*, which aired on KAET–TV in Phoenix, Arizona on Saturday, July 20, 1991, at 11:30 p.m. This controversial hour–long documentary by and about black male homosexuals was broadcast nationally over numerous PBS affiliates on a Saturday night during the summer, when there were unquestionably significant numbers of minors in the audience.

Tongues Untied opens with a naked man jumping and dancing in front of the camera. On several occasions, his genitals are briefly exposed. Later, two graphic and lifelike cartoons depict naked men with erect penises. One of the cartoon men is ejaculating, and ejaculate drips from his body. The program is filled with profanity, including frequent use of words considered indecent in *F.C.C. v. Pacifica*. There are 29 uses of "fuck," "fucked," "fucking" or "motherfucking;" 11 uses of "faggot," 3 uses of "shit," one reference to "ass," one reference to "dick" (meaning penis), and one use of "cum" (meaning ejaculate). That means one of these words was used, on average, nearly every minute of the program.

The following are transcriptions of two brief portions of the broadcast:

(Man narrates story of bus ride.)

> I was riding on the S–2 headed to Silver Spring. The bus, for most of the ride, had been filled with

the quiet murmur of the other passengers. Suddenly from the back of the bus a voice rose and wailed "You my **bitch**." "No, uh,uh, we are **bitches**." I turned around to look at the back of the bus. There were two brothers going at it. "No, you listen here, I ain't wearing lipstick, you are." "I ain't no **bitch**, I **fucked** you, you my **bitch**." This continued without resolution until we arrived at 16th and U street. The bus is packed with passengers by now. As we approach the stop, I see ten more waiting to step aboard. Just as the first person steps aboard a strident, hysterical voice shouts from the back, "I'm a forty-five-year-old black gay man who enjoys taking **dick** in his **rectum**. I'm not your **bitch**, your **bitch** is at home taking care of your kids."

* * *

(Man describes his difficult upbringing.)

Man: I heard my calling by age six. We had a word for boys like me.

Voice: Punk!

Man: Punk. Not because I played sex with other boys. Everybody on the block did that.

Voice: Punk!

Man: But because I didn't mind giving it away. Now other boys traded: "You can have my boody if you give me yours..." "Hmh, mmmmh -- b-but wait a minute now. If I

go first...". "Hmh, mmmmh, you went first last time." "B–but I want to be the daddy...". "Y–you the daddy all the time...". "B–but I want to be the daddy...". "I'm the daddy – – mmmm, mmmm. Mmmm, mmmm." Not me, I gave it up for free.

Voice: Punk!

Man: At age 11, we moved to Georgia. I graduated to new knowledge.

Voice: Homo!

Man: You don't know how to kiss...

Voice: Homo!

Man: my best friend asked? Shocked. I didn't know what to do with a girl when I lost at spin–the–bottle.

Voice: Homo!

Man: "I'll show you," he said, his brown eyes inviting. We practiced kissing for weeks – dry, wet, french – until his older brother called us a name.

Voice: Homo!

Man: "What's a Homo?" I asked.

Voice: Punk! **Faggot**! Freak!

Man: I understood. We stopped kissing. Best friend became worst enemy.

Voice: **Motherfucking coon!**

Voice: Age 12 they bussed me to Hepseba High on the outskirts of Augusta.

Voice: **Motherfucking coon!**

Man: A spray painted sign on the wall greeted me.

Voice: Niggers, go home!

Man: The Rednecks hated me.

Voice: **Motherfucking coon!**

Man: Because I was one of only two blacks placed in AA. The class for Hepseba's best and brightest.

Voice: Niggers, go home!

Man: The blacks hated me.

Voice: Uncle Tom!

Man: Because they assumed my class status made me uppity.

Voice: Uncle Tom!

Man: Assumed my silence as superiority.

Voice: Uncle Tom!

Man: I was shy.

Voice: **Motherfucking coon!**

Voice: Uncle Tom!

Man: I was confused.

Voice: **Motherfucking coon!**

Voice: Uncle Tom!

Voice: Niggers, go home!

Man: I was afraid and alone.

Voice: **Motherfucking coon!**

Voice: Uncle Tom!

Voice: Punk! **Faggot!** Freak!

Voice: Niggers, go home!

Voice: Homo!

Voice: Punk!

Voice: **Motherfucking coon!**

Voice: Uncle Tom!

Voice: Punk! **Faggot!** Freak!

Voice: Homo!

Voice: Niggers, go home!

Man: Cornered by identities I never wanted to claim. I ran, fast, hard. Deep inside myself where it is still, silent, safe. Deception.

Appendix "B"

"PRIVATE LESSONS"

Shown unedited on KZKC, an independent television station, in Kansas City, Missouri on August 28, 1987, at 8:00 p.m. This "R"–rated movie is about a chauffeur and a beautiful young housekeeper (HS) who try to blackmail the 15–year–old son (Philly) of their wealthy employer. The housekeeper, played by a former pornographic movie star, seduces the child and fakes her death during sex with the boy. The chauffeur and housekeeper extort $10,000 from the child while his father is away on business to keep the death of the housekeeper quiet. The following are transcripts and descriptions of some of the movie's most offensive scenes:

HS: Philly, if you want to watch me undress so badly, you should have told me.

Philly: What do you mean?

HS: Well, do you want to watch me undress?

Philly: Well, uhm, sure. I guess so.

HS: Go close the door.

Philly: What?

HS: I said "Close the door."

Philly: I'm not sure I got you right. Did you want me in or out?

HS: Well, did you want to watch me undress?

Philly: I guess so.

HS: Then in.

Philly closes door...

HS: Have a seat.

Philly walks over to chair across from bed where housekeeper is sitting and sits – smiling.

HS: Ready?

Housekeeper begins seductively undressing, first removing her slip, then her garter belt and hose.

HS: You still with me Philly?

Philly: (gulping) Pardon?

HS: Do you still want me to continue?

Philly: (smiling and gulping) Y–Yea! Yes, please.

HS: Not growing bored? Are you sure?

Philly: Oh! Yes!

Housekeeper slowly removes bra, covering first breast with hand, then showing second and then both. Philly is in shock. Camera remains focused on topless housekeeper.

HS: What do you think?

Philly: (gasping) Uh?

HS: My breasts! How do you like them?

Philly: Oh, Nice. Very nice.

Housekeeper walks over to Philly, practically placing her breasts in his face. During most of this scene, the housekeeper's breasts are the camera's main focus.

HS: Well, would you like to touch them?

Philly: Touch them?

HS: Yes.

Philly: (scene shows side view of one breast and Philly's face) No, n–not right now. Thank you.

HS: Are you sure?

Philly: Uh, uh yea. Uhm, maybe later.

HS: Good. But you still want me to continue then?

Philly: (sighing) Yes, please.

Housekeeper slowly walks back to resume undressing and throws Philly her bra. Smiling, he doesn't know what to do with it, so he hangs it on sewing machine. She begins removing her panties. Scenes go back and forth showing her slowly removing panties and him smiling awkwardly. Housekeeper turns around to remove panties, completely exposing nude buttocks, and then turns around again with only her panties in front and then offers Philly her panties.

He gets nervous and begins to leave. The camera continues to focus on her bare buttocks, with Philly visible behind her.

Philly: I-I-I think I-I'd better go now.

HS: So soon? You won't stay?

Philly: N-no, I'm sorry. I-I don't think so.

HS: What a pity. All right. Well, good night Philly.

Philly: Good night a-and thank you, I really enjoyed it.

HS: No, thank you. We should do this again some time.

Philly: Yea, thank you.

As Philly tries to leave, he turns around and runs into door.

* * *

The Housekeeper has invited Philly to her room. Scene opens with Housekeeper taking a bubble bath. Her breasts can be seen through the bubbles during the entire scene.

HS: Come in.

Philly: Hi, uhm, I looked for you in your room and you weren't there. You said you wanted to talk to me.

HS: Come in, Philly, come in

Philly: Uh, what are you doing in my father's bathtub?

HS: Oh, I don't think he would've minded my using his plumbing. Do you?

PhillY: No, no, I guess not.

HS: Would you like to wash my back?

Philly: Well... (Philly walks over to bathtub and bends down and washes her back – smiling. She moves his hand so that he's caressing her breast.)

HS: Would you like to join me?

Philly: Would I like to what?

HS: Take a bath with me?

Philly: You mean in there with you? Right now?

HS: Mmmm, mmm. Why don't you try it? Maybe you'd like it.

Philly: Well–uh, I probably wouldn't even fit in there.

HS: Oh, yes you would. I promise.

Philly: You mean you want me to take off all my clothes and everything?

HS: Do you usually wear them when you take a bath?

Philly: No, not usually.

HS: Oh, come on Philly, I won't even look.

Philly: I–I don't know.

HS: Oh, come on. It'll be an adventure.

Philly: Oh–oh all right.

Philly gets up to leave...

HS: Hey, where are you going?

Philly: To get undressed.

Philly returns in bathrobe...

HS: Well, hello.

Philly: Hi.

HS: Don't you want to take off your robe and join me?

Philly: O.K., just a sec.

Philly removes robe, revealing that he's wearing bathing suit.

HS: Bathing trunks? (laughing) That's marvelous. Won't you take them off?

Philly: No.

HS: Well, all right then. Come in the bath with your bathing trunks.

Philly stumbles into tub.

HS: Be careful, be careful.

Philly sits in front of the housekeeper and she washes his back and then moves her hands to his front.

HS: How does that feel?

She kisses him on the cheek, then again. He turns around to kiss her lightly on the lips.

HS: Are you sure you don't want to take them off?

Philly: O.K. Under one condition.

HS: What's that.

Philly: That we put out the lights.

HS: It's a deal.

Philly gets up to turn out the lights. The housekeeper's breasts again are fully exposed. He returns to bathtub. Somehow Philly's bathing trunks are removed. She caresses him and moves her hands toward his genitals. Philly gasps, jumps out of the tub (naked, nude buttocks showing) and grabs his robe, trying to put it on.

Philly: I–I think I'd better go now.

HS: Philly, wait a second. Wait a second, will you?

Philly: What?

HS: I'm sorry. Will you forgive me?

Philly: O.K.

HS: Prove it.

Philly: How?

HS: By sleeping with me tonight.

Philly: No.

HS: Philly! Why not?

Philly: Well, I've tried it once before in summer camp and I know for a fact that you can't get a good night's sleep if someone is in the same bunk with you. Well, thank you. It's been a lovely evening.

HS: Philly. Just to show there's no hard feelings, would you kiss me goodnight?

Philly: O.K.

Philly gives her a little kiss.

HS: Is it all right if I kiss you good night?

Philly: I guess so.

She gives him a long, deep kiss. Kissing down his neck, caressing his shoulder. He runs away.

* * *

Philly and housekeeper enter bedroom. They talk briefly, then begin kissing and undressing each other. First, her blouse is lowered, revealing her breasts. After she takes his shirt off, the camera focuses on her breasts. Her nipples are clearly erect. She slowly loosens his belt and unzips his pants, then runs her hands up his bare chest. As she walks to the bed, the camera lingers on her naked buttocks. They get into bed. Both are naked. They caress and massage each other, then he rolls on top. She is breathing heavily. Shadows show them moving back and forth in sexual intercourse. She begins to moan and gasp in sexual excitement. One final, loud gasp signals climax, and then she pretends to have died. She lies on the bed with both breasts exposed for several moments as a panicked Philly and the chauffeur discuss what to do.

* * *

In the last scene, the housekeeper is telling Philly goodbye. They kiss on the bed. She removes her blouse, and is topless in front of the camera. They kiss, and he removes his shirt. They kiss passionately. The camera focuses on her breasts. Her nipples are erect as Philly runs his hands over them. She takes Philly's hand and places it on the top of her panties. He pulls her panties off, and she is completely nude. He runs his hands over her bare buttocks and down her leg. He rubs her midriff, then her upper

thighs. She is on her back, naked. She rolls over and kisses him, then gets on top of him and rocks back and forth, with her breasts bouncing on his bare chest. His face is shown as he experiences sexual pleasure. Then she is shown on top, breathing heavily and thrusting. She closes her eyes and moans, presumably in orgasm. The scene closes with them asleep in bed together. This sex scene lasts several minutes.

Appendix "C"

"ONE TRICK PONY"

Shown unedited on the PBS affiliate in Phoenix, Arizona on Thanksgiving night, November 28, 1991 beginning at 11 p.m. Because Friday, November 29 was a state holiday, there was an increased likelihood that children were in the audience. The film, rated "R", follows the career struggles of a musician named Jonah, played by Paul Simon. There are about a dozen uses of the F–word, and several uses of the other "dirty" words listed by George Carlin, in his famous monologue, such as "bullshit" and "pussy" referring to a female's private area. In one early scene, Jonah and a female he just met sit and engage in a lengthy discussion in a bathtub. Both are naked, and the woman's breasts are uncovered and visible throughout the conversation.

In a later scene, Walter, the record company executive, confronts Jonah as he leaves Walter's office.

Walter: Jonah, you wouldn't by any chance be **fucking** my wife? Because that wouldn't be conducive to a good artist–record company relationship.

Next scene, Jonah and Walter's wife are in bed, naked, although covered by a sheet at the beginning of the scene.

Jonah: What was I going to say, "Yes Walter, I am sort of **fucking** your wife"?

Walter's wife: Is that what we're doing, sort of **fucking**?

Jonah and Walter's wife continue talking. She gets up out of bed, completely naked, then walks across the room nude. As the two continue talking and getting dressed, her breasts are completely exposed.

Appendix "D"

THE HOWARD STERN SHOW

Partial transcript from a broadcast on radio station WXRK–FM, New York, New York, on December 16, 1988, between 6:00 – 10:00 a.m.

Here's a guy who plays the piano with his penis. I'll tell you. What a weird crew.

She doesn't give me anything as far as jewelry is concerned. That's because you don't have a penis.

I think it will be worth the whole show just to hear her have an orgasm when I rub my ear.

I understand the doctor (hypnotist) explained that you would not go for that orgasm thing. Like, in other words, that you would not accept it... Boy, you must be difficult in bed. He says he'll hypnotize Bo the Lesbian...and she's a good subject. She's an empty slate.

Bo, you look great. Yes...Bo...getting very aggressive. Bo just rubbed herself in my face. Juliet (one of the naked girls) getting wild. Oh, my God. Diane (another naked girl) is whipping Bo. Good, girls, excellent. The big black lesbian is out of her mind with lust. Look at her. You can't say it on the air? Were you getting excited? Fabulous. All right. That was really good. Best part of the whole Christmas Party.

Appendix "E"

THE GARY DEE SHOW

Partial transcript from a broadcast on radio station WWWE-AM, Cleveland, Ohio, on June 21, 1989, between 2:00 - 6:00 p.m.

Caller: "Gary, I have a comment to make and then I want to tell you what my dream and my goal was for me in life."

Gary: "Excellent."

Caller: "My comment is Lou told me that Chris James gives fellatio okay. Now my dream, ya still there, Gary?"

Gary: "Yeah."

Caller: "Now, my dream is to get in Chris James' pants."

Gary: "Well, why don't you be a man and go down there and say that to her face. You know, you are just like a little kid masturbating in public. You've go no class, you've got no taste."

Appendix "F"

"PLAYBOY"

Excerpts from the October, 1987 issue of *Playboy* which aired on radio station KSD–FM, St. Louis, Missouri on September 28, 1987, at 6:50 a.m.

Hahn: He put his penis in my mouth and I was just starting to cry at that point. Because I couldn't believe...I just started to realize everthing that was happening.

First, of all, I couldn't breathe right. You know, it wasn't...it wasn't...it was just...Emotionally, I couldn't...Everything was like...

It was the very first thing this man did. He has pillows under me. He's sitting like, on my neck. I'm not breathing. I'm feeling sick. The guy is, like, letting loose and I'm choking. O.K. So I'm crying. Tears are coming...

Scheer: What do you mean, he was letting loose?

Hahn: (closing her eyes) The guy came in my mouth.

Appendix "G"

"EROTIC CITY"
Prince
Warner Bros.

A song aired on radio station KLUC–FM, Las Vegas, Nevada, on May 16, 1988, at 7:53 p.m.

ALL OF MY PURPLE LIFE
I'VE BEEN LOOKIN' FOR A DAME
THAT WOULD WANT TO BE MY WIFE
THAT WAS MY INTENTION BABE
IF WE CANNOT MAKE BABIES
MAYBE WE CAN MAKE SOME TIME
FUCK SO PRETTY YOU AND ME,
EROTIC CITY COME ALIVE

WE CAN FUCK INTO THE DAWN
MAKIN LOVE TIL CHERRIES GONE
EROTIC CITY CAN'T YOU SEE
FUCK SO PRETTY YOU AND ME.

EVERYTIME I COMB MY HAIR
THOUGHTS OF YOU GET IN MY EYES
YOU'RE A SINNER I DON'T CARE
I JUST WANT YOUR CREAMY THIGHS

IF WE CAN'T MAKE BABIES
MAYBE WE CAN MAKE SOME TIME
FUCK SO PRETTY YOU AND ME
EROTIC CITY COME ALIVE

WE CAN FUCK INTO THE DAWN
MAKIN LOVE TIL CHERRIES GONE
EROTIC CITY CAN'T YOU SEE

FUCK SO PRETTY YOU AND ME.

WE CAN FUCK INTO THE DAWN
(INTO THE DAWN)
HOW I WISH YOU WERE MY DAME
(REPEAT)
IF YOU CANNOT MAKE BABIES,
MAYBE WE CAN MAKE SOME TIME
FUCK SO PRETTY YOU AND ME
EROTIC CITY COME ALIVE

WE CAN FUCK INTO THE DAWN
MAKIN LOVE TIL CHERRIES GONE
EROTIC CITY CAN'T YOU SEE
FUCK SO PRETTY YOU AND ME.

WOOOOO WOOOO WOOOO WOOOO
BABY YOU'RE SO CREAMY
IF WE CANNOT MAKE BABIES
MAYBE WE CAN MAKE THE TIME
FUCK SO PRETTY YOU AND ME
EROTIC CITY COME ALIVE

WE CAN FUCK INTO THE DAWN
MAKIN LOVE TIL CHERRIES GONE
EROTIC CITY CAN'T YOU SEE
FUCK SO PRETTY YOU AND ME.

IF YOU CANNOT MAKE BABIES,
MAYBE WE CAN MAKE SOME TIME
FUCK SO PRETTY YOU AND ME
EROTIC CITY COME ALIVE

WE CAN FUCK INTO THE DAWN

MAKIN LOVE TIL CHERRIES GONE
EROTIC CITY CAN'T YOU SEE
FUCK SO PRETTY YOU AND ME.

EROTIC CITY...YEA!

Nos. 91-952 & 91-883

Supreme Court, U.S.
FILED
JAN 31 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND AMERICAN FAMILY ASSOCIATION, INC.,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS THE PACIFICA FOUNDATION, PEN AMERICAN CENTER, ALLEN GINSBERG, *ET AL.*, TO PETITIONS FOR WRITS OF CERTIORARI

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January 31, 1992

QUESTION PRESENTED

Whether the court of appeals erred, based on the record before it, in holding that a Federal Communications Commission regulation and a statute that would ban all speech deemed "indecent" by the FCC from broadcast over the radio and television in the United States on a 24-hour per day basis violate the First Amendment, particularly in light of the extraordinarily vague and broad "generic definition" of "indecency" promulgated by the FCC, and in remanding the matter to the FCC for redetermination of numerous unresolved issues.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the Petition of the Federal Communications Commission, No. 91-952, at ii. None of the respondents herein have any parent companies or subsidiaries. *See* Sup. Ct. Rule 29.1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 2
1. Background 3
2. The FCC's generic "indecency" standard 5
3. The *ACT I* decision 6
4. Proceedings in *ACT II* 7
5. The *ACT II* decision 11
REASONS FOR DENYING THE PETITIONS 13
CONCLUSION 29

TABLE OF AUTHORITIES

Cases Page

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Baggett v. *Bullitt*, 377 U.S. 360 (1964) 28
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Page

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422 U.S. 205 (1975) 19, 21
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397 U.S. 728 (1970) 18
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452 U.S. 61 (1981) 22
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467 U.S. 947 (1984) 28
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U.S. 463 (1979) 26

Page

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Pacifica Foundation, 95 F.C.C.2d 750 (1983) 4
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47 U.S.C. § 503(b)(2)(A) 28
Pub.L. No. 100-459, Title VI, § 608, 102 Stat. 2228 (1988) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Nos. 91-952 & 91-883

CHILDREN'S LEGAL FOUNDATION, INC. AND
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BRIEF IN OPPOSITION OF RESPONDENTS THE PACIFICA FOUNDATION, PEN AMERICAN CENTER, ALLEN GINSBERG, *ET AL.*, TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents The Pacifica Foundation ("Pacifica"), petitioner below, and PEN American Center ("PEN"), Allen Ginsberg, Norman Mailer, William S. Burroughs, Intercollegiate Broadcasting Systems, Inc., National Federation of Community Broadcasters, City Lights Booksellers & Publishers, David H. Halperin, Michael McClure, and Eileen Myles, intervenors below, respectfully request that this Court deny

the petitions for writs of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned matter.

STATEMENT OF THE CASE

This case involves an attempt by the Federal Communications Commission ("the FCC") to prohibit at any time of day or night on any radio or television station anywhere in the United States the broadcast of any speech that the FCC believes is "indecent" under the FCC's broad and vague "generic" definition of "indecency." The decision of the court of appeals, which, consistent with decisions of this Court and other courts of appeals, declared unconstitutional this unprecedented ban on the broadcast of core protected speech, is but a stage in one ongoing, incomplete proceeding. The matter has now been remanded to the FCC for redetermination of numerous issues after a full and fair hearing.

At the outset, respondents wish to emphasize that it is the FCC, not Congress, that has chosen a broad definition of "indecency" not limited to "nude dancing . . . adult movies . . . and sexually explicit messages like those now available on the telephone medium." Government Petition, at 10 ("Pet. at __"). Rather, the FCC's definition of "indecency" would ban from the airwaves speech that includes a wide range of serious political, social, literary, and artistic expression at the very core of the First Amendment. Because the plays of Shakespeare, the novels of James Joyce, and the poems of Allen Ginsberg all potentially fall within this definition, the FCC's ban strikes at the very heart of the First Amendment rights of broadcasters, writers and artists, and listeners alike. Although the government suggests that sexually explicit pornographic material will assault the airwaves in the absence of a 24-hour ban on "indecent" speech, Pet. at 10, the fact is that at least since 1975, broadcasters have been permitted to channel

"indecent" speech to the late evening hours. Yet the FCC has not cited a single broadcast of the type of pornographic material that it now claims justifies its draconian ban.

Throughout more than fifteen years of litigation and controversy concerning FCC efforts to censor so-called "indecent" broadcast speech, the FCC has focused consistently, and until very recently, exclusively, on the purported need of enabling parents to protect their *children* from "indecent" speech. Only in the most recent stages of this controversy has the FCC even suggested that its authority to punish "indecent" speech also derives from a claimed power to prevent *any adult* American from receiving indecent broadcast speech in the privacy of his or her home. Now, in its petition to this Court, for the very first time, the government places front and center this asserted "privacy of the home" interest to justify its absolute broadcast ban. In so doing, the government attempts to obscure the fact that the decision of the court below is an unremarkable application, based on its consideration of the evidentiary record, of the well-settled doctrine that an absolute content-based ban on constitutionally-protected speech cannot be sustained when it is obviously not the least restrictive, or even a narrowly tailored means, of achieving a compelling interest of the government.

1. Background

The "modern era" of FCC indecency regulation commenced in 1975, when the FCC ruled that a 2 p.m. radio broadcast of a satiric monologue on contemporary attitudes toward language, entitled "Filthy Words" by the popular comedian George Carlin, was "indecent". *See Pacifica*

Foundation, 56 F.C.C.2d 94 (1975).[1/] The FCC explicitly defined "indecency" in relation to the presence of children in the audience: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs, *when there is a reasonable risk that children may be in the audience*." *Id.* at 98 (emphasis added); *see* Appendix of Petitioner FCC at 41a (hereinafter "Pet. App. ___"). In a clarification, the FCC stated that it "'never intended to place an absolute prohibition on this type of language, but rather *sought to channel it to times of day when children most likely would not be exposed to it*.'" *Pacifica Foundation*, 59 F.C.C.2d 892 (1976) (emphasis added), *quoted in FCC* v. *Pacifica Foundation*, 438 U.S. 726, 733 (1978). The FCC defined children as those under age 12. Pet. App. at 32a-33a.

In *Pacifica*, this Court, in a 5-4 decision, affirmed the FCC's order and found the Carlin Monologue "indecent *as broadcast*." 438 U.S. at 735 (emphasis added). The Court "emphasize[d] the narrowness of [its] holding," *id.* at 750, and noted that its decision was based on "consideration of a host of variables," *id.*, including "[t]he time of day . . . [and] [t]he content of the program [,which] will also affect the composition of the audience," *id.*

Thereafter, the FCC followed a recognized policy of "channeling" "indecent" broadcast speech to the hours after 10 p.m., and of treating as "indecent" speech that involved repetitive use of words similar to those used in Carlin's monologue. Pet. App. 18a, 43a & n.12; *see WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254-55 (1978); *Pacifica Foundation*, 95 F.C.C.2d 750 (1983).

[1/] The FCC asserts authority to prohibit the broadcast of constitutionally-protected, but "indecent," speech pursuant to 18 U.S.C. § 1464 and 47 U.S.C. §§ 312(a)(6), (b), 503(b)(1)(D).

2. The FCC's "generic" indecency standard

The instant proceeding began with the FCC's April 29, 1987, release of a Public Notice and three orders in which, without prior notice of its intentions, the FCC greatly expanded the scope of speech that it would consider "indecent." *See* Pet. App. 162a-191a.[2/] The FCC stated that it would return to its 1975 definition of "indecent" speech set forth in *Pacifica Foundation*, 56 F.C.C.2d at 98, which would be "actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." Pet. App. 182a-183a (internal quotations omitted).

A number of interested parties sought reconsideration and clarification of these orders. In its December 29, 1987, Reconsideration Order, Pet. App. 39a-74a, the FCC refused to modify or to clarify its new "generic definition." *Id.* at 52a. Moreover, it refused to establish a clearly defined "safe harbor" for "indecent" material, merely stating that "after midnight" was its "current thinking." *Id.* at 62a n.47. As the FCC properly recognized, however, this Court in *Pacifica*

> made plain that our authority under Section 1464 is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material. . . . *we may only do that which is necessary to restrict children's access* to indecent broadcasts; *we may not go further so as to preclude access by adults* who are interested in seeing or hearing such material. . . . [a] reading of

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[2/] The FCC found that three broadcasters, including respondent Pacifica, had broadcast "indecent" speech under its new generic standard. Pet. App. 162a-191a.

> Section 1464 . . . under which the broadcast of indecent material *would be prohibited altogether would, we believe, run afoul of this constitutional premise.*

Id. at 49a-50a (emphasis added); *see also id.* at 62a n.47.

3. The *ACT I* decision

On review of the Reconsideration Order, the court of appeals affirmed in part and reversed in part. *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C.Cir. 1988) (hereinafter "*ACT I*"); Pet. App. 13a-38a. In *ACT I*, the FCC explicitly acknowledged that its *sole* interest in regulating "indecent" speech is "in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes." Pet. App. 37a (emphasis original). Although the court in *ACT I* recognized that "vagueness is inherent" in the FCC's broad, generic definition of "indecent" speech, *id.* at 38a, it refused to consider the vagueness issue on the merits. Rather, it held that this Court's decision in *Pacifica* foreclosed further inquiry, *id.* at 24a-26a, although this Court's "emphatically narrow holding" in *Pacifica*, *see Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), certainly did not appear to adopt the FCC's generic definition of indecency. The court in *ACT I* also rejected an overbreadth challenge mounted by various parties based on the FCC's failure to recognize serious merit as a constitutionally required defense. Pet. App. 27a-29a.

The court in *ACT I*, however, held that "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule." *Id.* at 36a n.18. The court then remanded the matter to the FCC "for redetermination, *after*

a full and fair hearing, of the times at which indecent material may be broadcast." *Id.* at 38a (emphasis added).[3/]

Following the decision in *ACT I*, Congress adopted a rider to an appropriations bill, known as the "Helms Amendment," which required the FCC to promulgate regulations that would ban the broadcast of "indecent" speech 24 hours a day effective no later than January 31, 1989. Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988); Pet. App. 75a. The FCC then refused to conduct the "full and fair hearing" mandated in *ACT I*. Pet. App. 76a-77a. Instead, on December 21, 1988, the FCC adopted a rule that "[t]he Commission will enforce . . . Section 1464 . . . on a twenty-four hour a day basis." *Id.* at 75a. Although the Helms Amendment did not so require, the FCC further stated that it "will continue to apply its generic definition of indecency. . . ." *Id.* at 77a.

4. Proceedings in *ACT II*

On January 23, 1989, the court of appeals granted the motion of the petitioners below to stay enforcement of the absolute ban on broadcast indecency, pending full review by that court. *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. Jan. 23, 1989) ("*ACT II*"), Joint Appendix filed in No. 88-1916 (D.C. Cir.), at 3 (hereinafter "J.A. ___"). Thus, the 24-hour ban has never gone into effect. While *ACT II* was pending, this Court decided *Sable Communications*, *supra*, in which this Court reaffirmed that "indecent," but not obscene, speech is protected by the First Amendment, and that content-based restrictions on "indecent" speech are subject to

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[3/] The *ACT I* court also criticized the FCC's unexplained decision to raise its definition of "children" from under 12 years to under 18 years and its failure to consider the "predicted audience for the specific radio station in question," rather than "the *total* radio audience," and remanded those issues as well. Pet. App. 32a (emphasis original).

strict judicial scrutiny. 492 U.S. at 126. After *Sable*, the FCC sought to "remand the record" to permit it "to collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." *ACT II*, Motion for Remand, at 1, 2-3 (filed Aug. 24, 1989), J.A. 6-8. The court granted the motion, and ordered, for the *second* time, that the "FCC *shall conduct a full and fair hearing* on the issue of the propriety of indecent broadcasting . . . ." *ACT II*, Order (D.C.Cir. Sept. 13, 1989), J.A. 4 (emphasis added).

The FCC, however, again chose to ignore the court's order. Instead, the FCC issued a Notice of Inquiry ("NOI") the stated purpose of which was "to allow [the FCC] to compile a record *in support of* Congress' imposition of a 24-hour ban on the broadcast of indecent material." Enforcement of Prohibitions Against Broadcast Indecency, 4 F.C.C. Rcd 8358 (Nov. 20, 1989), J.A. 12 (emphasis added). In the NOI, for the first time in these proceedings, the FCC suggested in a footnote, "an alternative government interest in protecting the public's right to be free from indecent material in the privacy of their homes." *Id.* at 8365 n.10, J.A. 19.

The respondents herein submitted comments to the FCC in which they challenged the total ban and the generic definition on various grounds. They argued, *inter alia*, that numerous important works of art and literature that included "indecent" language, and which have been previously broadcast, particularly on noncommercial radio stations, would be forever banned from the airwaves of this country.[4/] These respondents also showed that small noncommercial radio stations in particular, which focus on an adult audience, and which often engage in innovative, non-mainstream programming, were forced to engage in costly self-censorship because

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[4/] *See* Comments of Pacifica, *et al.*, at 13-20, J.A. 320-27; Comments of PEN, *et al.*, at 4-8, 16-20, J.A. 376-80, 388-92.

they were necessarily left to guess at whether much of their programming fell within the generic definition. As a result, they showed that a 24-hour ban would eliminate a broad range of serious literature, art, music, social commentary on such topics as AIDS and homosexuality, news, and public affairs programming that is unavailable elsewhere.[5/] Pacifica also submitted data showing that the audience of minors for noncommercial radio stations is statistically insignificant.[6/] Other commentors provided undisputed evidence that the vast

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[5/] *See* Pacifica Comments, at 13-20, 25-27, and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, PEN Comments, at 16-17, J.A. 388-89. For example, many dramatizations of literary works read live on the radio and oral presentations by the authors of such works are not available elsewhere. Under the FCC's broadened indecency standard, Pacifica radio stations have been forced to cancel or heavily edit daytime dramatic readings of contemporary and classic literary works, including, to list only a few, Allen Ginsberg's *Howl*, Alice Walker's *The Color Purple*, James Joyce's *Ulysses* and John Steinbeck's *The Grapes of Wrath*. They have also cancelled or heavily edited the airing of interviews with some of the most controversial and provocative personalities of our times, including Abbie Hoffman, Miles Davis and Dick Gregory, and discussion programs on a range of topics such as AIDS, rape and sexuality for older women. Under a 24-hour ban, virtually none of this programming would be available to the public from any source. Likewise, live news broadcasts, live coverage of public trials and public hearings are not otherwise available. Furthermore, the broadcast medium is an important resource for millions of illiterate Americans and is free of direct costs to the audience.

[6/] Teen listening to public radio accounts for a mere 0.2% of teen listening generally and for virtually no percentage of total radio listening. Pacifica Comments, at 21-25, and Attachment 4, J.A. 328-32, 366-72.

majority of children and teenagers are subject to an opportunity for adult supervision, particularly at night.[7]

The FCC issued its Report on August 6, 1990, Pet. App. 82a-161a, in which, not surprisingly in light of its self-proclaimed mandate to compile a record in support of its ban, it found that a broadcast ban on constitutionally protected "indecent" speech was proper. The FCC explicitly conceded that its 24-hour ban could withstand constitutional scrutiny only if it served a compelling interest and was "'the least restrictive means to further the articulated interest.'" *Id.* at 91a (quoting *Sable*, 492 U.S. at 126).

The FCC nevertheless asserted that the 24-hour ban met this strict test because of ratings data that showed that *some* teenagers remained in the overall broadcast audience at all times. *Id.* at 129a-131a. This finding, in turn, rested on a redefinition of "children" to include 12-17 year-olds. The *only* data that shows that minors remain in the radio audience after 10 p.m. concerns 12-17 year-olds as an undifferentiated bloc. *See* Pet. at 17; Pet. App. 32a n.16, 111a. Thus, to justify the ban, the FCC had no choice but to change its definition of "children." Furthermore, disregarding its position in *ACT I*, *id.* at 36a-37a, the FCC asserted an independent interest in ensuring that all children and teenagers under eighteen years old are not exposed to any "indecent" speech, regardless of parental opportunity to supervise and regardless of parental wishes, *id.* at 94a-95a & n.22; 121a-122a. In response to the unrefuted evidence that virtually all minors are subject to the opportunity for adult supervision, the FCC took the unprecedented position that, regardless of parental wishes, *the government* would only be satisfied with "active[]" supervision

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[7] Comments of Action For Children's Television, *et al.*, at 29-34 and Appendix C, J.A. 130-35, 232-50.

"at all times" of minors' viewing and listening habits. *Id.* at 128a.

The FCC also determined that, as an affirmative defense to a charge of indecent broadcasting, broadcasters may show that at the time the challenged broadcast was aired, minors are generally not in the audience in the station's *market area*; it would *not* be a defense to show that minors do not listen to the station at the time of the broadcast. *Id.* at 145a-147a. This determination ignored *ACT I*, which held that the FCC must show, at a minimum, that significant numbers of children are in the audience *of a particular station* at the time it airs an "indecent" broadcast. *Id.* at 32a.

The FCC devoted a mere two perfunctory paragraphs in its 96-paragraph Report to its novel proposition that "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a-102a. It did not attempt to reconcile this asserted interest, however, with its provision of an affirmative defense based on the absence of *minors* in the audience.

5. **The *ACT II* decision**

On review, the court below (Mikva, C.J., Edwards and Thomas, J.J.) held that the FCC's blanket prohibition violated the First Amendment. Pet. App. 1a-12a.[8/] The court, after reviewing the record and considering the appropriate standard for restricting constitutionally protected speech under *Sable* and *ACT I*, held that the Constitution precluded the FCC's proposed absolute broadcast ban on constitutionally protected "indecent" speech. *Id.* at 9a-11a. The court further noted that

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[8/] Following the issuance of the Report, the intervenor-respondents herein, all of whom had filed comments with the FCC, sought and were granted leave to intervene and join in the separate brief of The Pacifica Foundation, a petitioner in both *ACT I* and *ACT II*.

nothing in the appropriations rider or the FCC's Report altered the force of the constitutional standards applied in *ACT I* and reiterated by this Court in *Sable*. *Id.* at 10a-11a.[2/] For the *third* time, the court below:

> direct[ed] the Commission, in "redetermin[ing], *after a full and fair hearing*, . . . the times at which indecent material may be broadcast," to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population; and the scope of the government's interest in regulating indecent broadcasts. *See ACT I*, 852 F.2d at 1341-44.

Id. at 12a (emphasis added).

The FCC and intervenor Citizens For Decency Through Law, Inc. (now Children's Legal Foundation, Inc.) sought rehearing and rehearing *en banc*, which requests were denied on August 28, 1991, with no judge of the court requesting the taking of a vote. *Id.* at 192a-193a. The two petitions for certiorari followed. This Court granted respondents' request to file their opposition briefs by January 31, 1992, and to respond to both petitions in each opposition brief.

[2/] The court also followed *ACT I* in rejecting vagueness and overbreadth challenges to the FCC's generic indecency definition. Pet. App. 7a-8a. Given its holding that the 24-hour ban was unconstitutional, the court did not address Pacifica's related argument that, even if the generic definition is not unconstitutionally vague and overbroad when joined with a clear safe harbor, the generic definition could not be sustained under a 24-hour ban on "indecent" speech. *See* Point III, *infra*.

REASONS FOR DENYING THE PETITIONS

The petitioners have failed to set forth any reason to review the unanimous decision of the court below that the FCC's absolute broadcast ban on constitutionally protected speech violates the First Amendment. In two decisions, one stay order, and petitions for rehearing and rehearing *en banc*, not one judge of the court below has stated that such a ban is constitutional. Indeed, prior to passage of the appropriations rider in 1989, the FCC itself explicitly acknowledged that the ban it now defends before this Court is unconstitutional.

The decision below carefully follows the decisions of this Court in *Sable* and *Pacifica*, and breaks no new legal ground. Petitioners do not allege a conflict in the circuits, as none exists. Indeed, the government appears to be most dissatisfied with the brevity of the decision below, demanding this Court's review "to assure that Congress's and the Commission's resolution of the important interests at stake receives more meaningful consideration than the court of appeals gave it." Pet. at 20. The government simply ignores the fact that the court below, after consideration of the record and the arguments, once again remanded the matter to the FCC to consider numerous unresolved issues, including "the scope of the government's interest in regulating indecent broadcasts," after a "full and fair hearing," Pet. App. 12a, which the FCC has steadfastly refused to hold.

Petitioners' complaint that the court below did not explicitly address the government's purported interest in protecting adults in the privacy of the home obscures the fact that the government barely made mention of this argument in its Report, brief, or argument below, and that the FCC itself clearly did not consider this "interest" to be sufficient to justify its absolute ban. Only now, on petition to this Court, has the government for the first time emphasized this argument. The decision of a court of appeals not to address

directly an argument that the government itself chose to downplay, but rather to remand for redetermination after a proper hearing, is no reason for this Court to grant review. In any event, the government's position that it may totally ban any speech from radio or television that it believes some adult Americans might find offensive in order to "preserve the privacy of the home" is a meritless and unprecedented argument that does not justify this Court's review.

The petitioners also provide no reason to review the decision below that the broadcast ban is unnecessary to achieve the government's interest in facilitating parental control of their children. The decision below adheres faithfully to the controlling principles of *Pacifica* and *Sable*, and petitioners are again unable to cite any case that supports the ban. The court of appeals, moreover, reviewed the record and, finding it deficient in numerous respects, remanded for a full and fair hearing at which all of the pertinent issues are to be explored. Review by this Court prior to this hearing would be wasteful of this Court's resources and would present an incomplete record for determination of the constitutional issues.

The court of appeals did not reach the alternative ground for affirmance raised below that, even if a 24-hour broadcast ban were theoretically constitutional, a ban based on the FCC's extraordinarily broad and vague definition of "indecency" could not be sustained. This definition is solely the creation of the FCC, and is not compelled by any act of Congress or by the courts. On remand, therefore, the FCC may choose to pursue a more limited definition. Such a narrowing of the defintion of "indecency" might, in turn, affect the view of the courts on the constitutionality of any regulation ultimately promulgated by the FCC. In the absence of any narrowing, the FCC's generic definition, when combined with a 24-hour ban, would have an *in terrorem* effect on broadcasters that would cause them to remove a broad range

of protected speech from the airwaves out of fear that the FCC might deem such programming "indecent." Indeed, even with time-channeling, the generic definition is so vague that it impermissibly fails to put a reasonable broadcaster on notice of what speech the FCC might find "indecent."[10/]

I. In the court below, the government barely asserted a purported interest in protecting the privacy of the home and certainly made no claim that this interest was an independent compelling interest that could only be served by an absolute broadcast ban on so-called "indecent" speech.[11/] Indeed, the FCC itself has undermined any such claim by its creation of a defense to a charge of indecency when a broadcaster shows that children were not in the broadcast audience in the station's market area at the time of an "indecent" broadcast. Pet. App. at 145a-146a.

The government's petition is based less upon the assertion that the ban is justified by a purported interest in protecting some adults in the privacy of their home than upon the assertion that "the court was obligated to consider all the legitimate justifications for the statute at issue." Pet. at 14. This argument is wrong on several grounds. First, the government provides no citation for the remarkable proposition that the federal courts must directly address on the

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[10/] Respondents herein concur fully in the arguments of respondents Action For Children's Television, *et al.*, that the petitions should be denied because, *inter alia*, the decision below is not final and the matter has been remanded to the FCC for a full and fair hearing of numerous relevant issues, and because this matter will not be reviewed by the full Court as Justice Thomas joined in the decision below.

[11/] In its 50-page brief below, the government devoted one short paragraph to this issue, and argued only that "the asserted interest in protecting the privacy of the home from unwanted indecent broadcasts has received judicial recognition." Gov. Br. at 36. It did not raise the issue at oral argument.

merits every argument presented by the government, no matter how meekly, and that the failure to do so entitles the government to this Court's review. Second, the government simply ignores the fact that the court below gave this argument the consideration it deserved when it ordered the FCC, for the third time, to "redetermin[e], after a full and fair hearing . . . the *scope of the government's interest* in regulating indecent broadcasts." Pet. App. 12a (emphasis added). No law or precedent requires more.

In any event, the government's argument that its asserted interest in protecting objecting adults justifies the absolute broadcast ban is directly contrary to well-settled doctrine of this Court and does not merit review. As the government has expressly conceded, and as this Court has recently reiterated, speech dubbed by the FCC as "indecent but not obscene is protected by the First Amendment." *Sable*, *supra*, 492 U.S. at 126; *see* Pet. App. 88a.[12/] Moreover, the parties are in full

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[12/] In its petition, the government wrongly suggests that "indecent speech is only marginally within the 'outer perimeters of the First Amendment.'" Pet. at 19 (quoting *Barnes* v. *Glen Theatre, Inc.*, ___U.S.___, 111 S.Ct. 2456, 2460 (1991)). In *Barnes*, however, this Court was not referring to broadly-defined generic "indecent" speech, but specifically to nude barroom dancing, which this Court characterized as "expressive conduct" akin to symbolic speech. *Id.* at 2460-61. Having chosen a generic definition of indecency, Pet. App. 77a, which encompasses broad categories of serious core protected speech, the FCC cannot now pretend that it only seeks to ban the broadcast of "nude dancing . . ., adult movies . . ., and sexually explicit messages like those now available in the telephone medium." Pet. at 10. The FCC has never contended, nor could it, that any broadcaster has attempted to broadcast speech of this nature or that broadcasts of this sort led to the imposition of the 24-hour ban. *See* FCC Report, Concurring Statement of Commissioner Quello, at 2 & nn.4 & 5. Rather, the FCC has chosen to punish the broadcast of humorous and satiric songs or banter consisting of sexual innuendo, double entendres, and occasional

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agreement that the government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126; Pet. App. 88a-89a. Protection of adults from possible momentary exposure to "indecent" speech as defined by the FCC is not a compelling interest and, in any event, an absolute broadcast ban is neither the least restrictive nor even a narrowly tailored means of achieving the asserted interest.

Broadcast speech does not intrude into the home in the same way that speech intrudes upon a truly "captive audience." Thus, there is no compelling interest in protecting adults from possible momentary exposure to such speech. While this Court has recognized the rights of "captive" audiences to be free of unwanted speech, it has only allowed such restrictions "when the 'captive' audience *cannot avoid* the objectionable speech." *Frisby* v. *Schultz*, 487 U.S. 474, 487 (1988) (emphasis added) (individualized residential picketing, where "[t]he resident is figuratively, and perhaps literally, trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech") (emphasis added); *see Lehman* v. *Shaker Heights*, 418 U.S. 298, 307-08 (1974) (public transportation riders); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (blaring loudspeakers leave residents "practically helpless to escape this interference" with privacy).

This Court, however, has explicitly refused to extend the "captive audience" exception to situations in which the unwilling recipient can readily avoid exposure, including within the privacy of the home. *See, e.g., Bolger* v. *Youngs*

12/ (...continued)

"dirty" words (not unlike certain passages in Shakespeare's plays), as well as serious dramatic works aimed at adult audiences. *See* Pet. App. 162a-191a; J.A. 714-78.

Drug Products Corp., 463 U.S. 60, 72 (1983); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 542 (1980); *Martin* v. *City of Struthers*, 319 U.S. 141, 146-49 (1943); *cf. Cohen* v. *California*, 403 U.S. 14, 21 (1971). Adults who affirmatively invite broadcast speech into their homes are not "captive audiences." They may avoid speech they find offensive, upsetting, or boring with a twist of the dial or by checking TV and radio listings, or by comporting their listening and viewing habits with clear time-channeling rules. The *de minimis* upset experienced by an adult who momentarily tunes into an offensive broadcast can hardly justify the absolute ban that the FCC seeks to impose upon all Americans. *See Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970).

The government primarily relies on a wholly unwarranted reinterpretation of this Court's decision in *Pacifica*. In *Pacifica*, of course, this Court was not presented with a total ban on protected speech. Thus, the Court's brief general discussion of the "individual's right to be left alone" in the home, 438 U.S. at 748, cannot support the much more sweeping *total* ban at issue here. As noted, *supra*, the decision in *Pacifica* was "an emphatically narrow holding," *Sable*, 492 U.S. at 127, which repeatedly emphasized the particular program at issue, the time of the broadcast, and the interest in protecting young children. *Pacifica*, 438 U.S. at 750; *id.* at 760 (Powell, J., concurring). Indeed, the Court in *Sable* explicitly distinguished *Pacifica* by stating, "The FCC rule [in *Pacifica*] was not intended to place an absolute prohibition on the broadcast of this type of language, but rather *sought to channel it* to times of day when children most likely would not be exposed to it. . . . The issue of a total ban was not before the Court." 492 U.S. at 127 (emphasis added, internal quotations omitted). At most, *Pacifica* acknowledged that the pervasiveness of the broadcast media, in conjunction with the presumed presence of children in the audience, permitted

limited regulation in order to channel "offensive" speech to particular times of the day. *Id.* at 757 (Powell, J., concurring). As Justice Powell stated in his concurrence:

> [t]his is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.

438 U.S. at 759-60; *see also* Pet. App. at 49a-50a (FCC acknowledges that *Pacifica* prohibits an absolute ban); *Bolger*, 463 U.S. at 72 ("we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended"); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 701 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Cohen*, 403 U.S. at 21.

There is no reason for this Court to consider the government's unprecedented position that protected broadcast speech may be totally suppressed because it might be offensive to some adults with delicate sensibilities. Coverage of American soldiers dying in a far-off war, criticism of United States policies, public hearings or trials on the alleged sexual conduct of public officials or celebrities, and discussions of critical public health issues such as AIDS may be offensive, indeed shocking, to many. This Court, however, has explicitly warned of the dangers posed by such government censorship:

> The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen, 403 U.S. at 21.[13/]

II. Petitioners provide no reason for this Court to review the decision of the court below that the government need not as a factual matter, and may not as a matter of law, accomplish its interest in facilitating parental control over their children by "'reduc[ing] the adult population . . . to . . . only what is fit for children.'" *Bolger*, 463 U.S. at 73 (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)). The court of appeals' decision finds ample factual support in the record and deviates in no way from well-established law. Moreover, the government is simply wrong in contending that the court below did not consider the record. Its decision makes clear that it found the record insufficient to support the ban and remanded to the FCC to conduct a full and fair hearing on numerous unresolved issues. Pet. App. 12a.

Thus, for instance, the court found inadequate the FCC's almost exclusive reliance on data on the listening and viewing habits of 12-17 year-olds as an undifferentiated bloc, with virtually no data on children under 12 years. *See* Pet. at 17; Pet. App. 111a-121a. In the past, the FCC had focused its attention only on children under age twelve, and it had virtually no evidence that any significant number of children in this age group are in the broadcast audience after 10:00 p.m. As a result, having determined in advance "to compile a record in support of Congress' imposition of a 24-

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[13/] Even were protecting residential privacy a compelling interest here, time-channeling cures any concern about protecting those adults who want to avoid the risk of exposure to indecent material. These adults may check their TV and radio listings before turning on their sets, or, if unsatisfied with anything less than absolute assurance, may simply choose to avoid late night television or radio. Thus, a total broadcast ban that denies every adult in this country access to constitutionally protected speech is not the least restrictive, or even a narrowly tailored, means of serving the government's purported interest.

hour ban," 4 F.C.C.Rcd 8358, J.A. 12, the FCC had no choice but to redefine "children" to include 17 year-olds. The court below, however, refused to accept on this incomplete record the FCC's decision to raise the age of "children" to include high school seniors and college freshmen, and thus remanded to the FCC to "redetermin[e], after a full and fair hearing . . . the appropriate definitions of 'children.'" *Id.* at 12a; *see id.* at 32a-33a (*ACT I*).[14/]

Furthermore, the court of appeals decision comports with settled law and raises no legal issue warranting this Court's review. Neither this Court nor the lower federal courts have ever upheld an absolute content-based ban on constitutionally protected "indecent" speech within an entire medium of expression, in order to protect children or otherwise, and petitioners have presented no reason to revisit that issue here. *See, e.g., Sable*, 492 U.S. 115; *Pacifica*, 438 U.S. at 733 (FCC rule not "intended to place an absolute prohibition on the broadcast of this type of language"); *Bolger, supra*, 463 U.S. 60; *Community Television of Utah, Inc.* v. *Wilkinson*, 611

[14/] High school students clearly have a constitutional right to receive information that the FCC would consider indecent. *See Bolger, supra*, 463 U.S. at 74 n.30; *Erznoznik, supra*, 422 U.S. at 213-14 & n.11. Moreover, high school students are regularly exposed to literary works in their libraries and curricula that clearly fall within the FCC's generic standard. *See* PEN Comments, at 21-22 & n.26, J.A. 393-94. High school age minors also have substantial constitutional and statutory rights that recognize their sexual maturity and knowledge. *See, e.g., Carey, supra*, 431 U.S. at 694-99. Most states, for example, permit teenagers to consent to health services related to pregnancy and for sexually transmitted disease. Indeed, it simply blinks reality to claim that, in this day of explicit AIDS education, high school students are in need of protection by the government, regardless of parental wishes, from the sort of social satire, double-entendre, sexual innuendo, and pop music that the FCC has found indecent. *See* Pet App. 162a-191a; J.A. 714-78.

F.Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985); *cf. City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding content-*neutral* regulation of location of adult theatres only because adult theatres are *not* banned altogether); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (content-neutral ban on all live entertainment in municipality held unconstitutional); *see also* FCC Report, Concurring Statement of Commissioner Quello, at 1 & n.3 (collecting cases), J.A. 78.

The undisputed factual record also demonstrates that virtually all parents have the opportunity to supervise, or to have another adult supervise, their children's viewing or listening activities, particularly at night. Pet. App. 121a-123a; *see* Comments of ACT, at 29-35, and Appendix C, J.A. 130-36, 232-50. Faced with this evidence, the FCC now asserts that it will be satisfied only with "active" parental supervision, Pet. App. 6a, which the FCC defines as "requir[ing] parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times." *Id.* 128a; *see id.* at 121a-129a. Thus, the government has come full circle from its stated position in *Act I* that "the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes," *id.* at 37a (emphasis original). Its position before this Court is that parental wishes are irrelevant, and that the government, having determined for itself what is proper parental supervision of all minors under age 18, and having determined that not all parents meet this standard, has decided to eliminate parental choice entirely in this area.

The court below, in determining that the absolute ban was not a precisely drawn response to the government's legitimate interests in protecting children, quite properly

rejected the FCC's unprecedented determination of what constitutes proper parental supervision, and its decision to eliminate parental choice in how they will supervise their children's receipt of constitutionally protected expression. *See id.* at 6a, 9a-11a. As a constitutional matter, the relevant inquiry must be whether parents have *the opportunity* to supervise their minor children, not whether they police their children precisely according to the government's dictates. *See Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968) ("constitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Cruz*, *supra*, 755 F.2d at 1420 (availability, rather than actual usage of, cable lockboxes sufficient to hold ban on indecent broadcasts on cable television unconstitutional).

As the government forthrightly acknowledged in *ACT I*, its sole legitimate interest in this matter is to facilitate parental supervision of their children, not to replace parents with a broadcast "Big Brother." *See, e.g., Bolger*, 463 U.S. at 73-74; *Ginsberg*, 390 U.S. at 639; *Fabulous Assoc., Inc.* v. *Pennsylvania Publ. Utilities Commission*, 896 F.2d 780, 788 (3d Cir. 1990). The government is not the nation's super-parent, and it has no right to mandate parental behavior in the area of receipt of constitutionally protected speech merely because it would prefer that parents deny to their teenage children material that a majority of FCC commissioners deems "indecent."

The FCC's findings, moreover, are directly contrary to common sense. Parents who really are concerned with and want to protect their children from "indecency" have the opportunity to take whatever steps they deem necessary to prevent their children from watching or listening to programs

they believe are unsuitable.[15/] Indeed, the FCC, in its 1987 Reconsideration Order, found it reasonable after midnight "to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." Pet. App. 62a-63a n.47; *see also Pacifica Foundation* v. *FCC*, 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children"), *rev'd*, 438 U.S. 726 (1978). Nothing in the record vitiates the reasonableness of the FCC's prior view.

Finally, the government improperly contends that the adult broadcast audience may be reduced to that which is fit only for children because of the availability of "indecent" speech in other media. Pet. at 19. However, an absolute ban on "indecent" broadcast speech is especially improper precisely because broadcasting is pervasive. Radio and television are undoubtedly the primary means by which large numbers of Americans, especially adults, receive news, information, and entertainment. The FCC simply ignores reality when it asserts that generically defined "indecent" broadcast programming is largely fungible with "indecent" materials in other media.[16/]

[15/] These options include, *inter alia*, co-viewing and co-listening, actually monitoring their children's watching or listening, prohibiting their children's use of television or radio during certain hours, purchasing televisions with channel blocking devices (which are now widely available, *see* Pet. App. 125a n.84), or taking possession of their children's television sets and radios.

[16/] As the record demonstrates, much of the programming which falls within the FCC's broadcast ban is otherwise unavailable to the public. *See* n.5, *supra*. Moreover, the Supreme Court has consistently rejected the argument that a content-based prohibition may be sustained

(continued...)

III. Nothing in the Helms Amendment, or in any decision of the courts, compels the FCC to abide by its broad generic definition of indecency. Should this Court deny the petitions for certiorari, therefore, the FCC on remand will be free (and respondents will urge it) to adopt a definition more narrowly tailored to achieve the government's legitimate purposes. Such a narrowing of the definition might then affect how the courts would view the constitutional issues raised by any rule which the FCC ultimately adopts. Review by this Court now would be premature and may be rendered unnecessary depending on the FCC's and the court of appeals' actions upon remand.

In the court below, respondents argued that the FCC's generic definition of indecency is unconstitutionally vague and overbroad and that, in any event, the 24-hour ban may not be sustained in light of the FCC's inherently vague definition. The court, without further analysis, stated that its holding in *ACT I* "precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague." *Id.* at 7a. In light of its ruling that the 24-hour ban could not stand, moreover, it had no need to address respondent's alternative contention that, even if a 24-hour ban were theoretically permissible, it could not be sustained in conjunction with the vague, overbroad definition.

In *ACT I*, the court concluded that this Court's disposition of *Pacifica* precluded it from addressing the question whether the FCC's generic definition of indecency is unconstitutionally vague. Pet. App. 25a-26a. The court noted, however, that "[w]e have upheld the FCC's generic definition

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16/ (...continued)

because of the theoretical availability of an alternative medium of expression. *See, e.g., Bolger*, 463 U.S. at 69 n.18; *Consolidated Edison, supra*, 447 U.S. at 541 n.10 (1980); *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

of indecency in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear." *Id.* at 29a-30a. Now that the FCC has foregone channeling and has acted to banish "indecent" speech from the airwaves 24 hours a day to "protect" adults as well as minors, however, the underlying premise for the lower court's rejection of overbreadth and vagueness challenges in *ACT I* no longer obtains.[17/]

Whether the generic definition standing alone is unconstitutional, there is no doubt that the definition necessarily leaves broadcasters guessing as to what material they may safely air. Nevertheless, since 1987, the FCC has steadfastly refused to clarify this standard to make it comprehensible to

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[17/] Respondents herein contend, as they did below, that the generic definition is unconstitutionally vague and overbroad, and that this defect provides an alternative basis for affirmance of the decision below in the event *certiorari* were granted. *See Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). In *Pacifica*, this Court, in response to an argument that the identical generic definition was unconstitutional because "the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech," 438 U.S. at 742, stated that this "argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* Thus, the Court expressly did not address the constitutionality of the generic definition. *See Carlin Communications, supra*, 837 F.2d at 559 ("The *Pacifica* Court declined to endorse the Commission definition of what was indecent"). Moreover, following this Court's holding in *Pacifica*, the FCC felt compelled to abandon the generic standard for the substantially narrower and more precise definition which it thereafter followed until 1987. *See* Pet. App. 43a. Were this Court to determine that the FCC's definition of indecent speech is itself unconstitutionally vague or overbroad, it need not address the merits of the 24-hour ban at this time.

broadcasters. *See, e.g.*, Pet. App. 52a-54a. The combination of a broad and vague generic definition of indecency and a twenty-four hour ban will not only eliminate from the airwaves all constitutionally protected speech that the FCC deems "indecent," but will inevitably have the *in terrorem* effect of chilling broadcasters from airing substantial amounts of speech of significant merit that the FCC might find *not* "indecent," but which a broadcaster might reasonably fear would be so construed by a majority of the Commissioners of the FCC.

When there is a clearly defined safe harbor, a broadcaster at least has the option of broadcasting potentially "indecent" speech during that time period, and willing adults at least have the option of tuning in at that time.[18/] Thus, the problem of a twenty-four hour ban of generic indecency is not only that great literary works may be deemed "indecent" and therefore banned from the airwaves; the problem is that even if the FCC might ultimately deem such works "decent," no broadcaster, particularly a noncommercial broadcaster with limited resources, will in the first instance dare to air such works at the risk of losing its license or incurring a substantial

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[18/] Respondents do not concede that such a solution is constitutional. An unconstitutionally vague or overbroad law should not be upheld simply because it does not apply everywhere and at every time. Rather, vagueness doctrine requires that prohibitions on speech be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974); *see also Houston* v. *Hill*, 482 U.S. 451, 465-67 (1987) (overbroad law "accords the police unconstitutional discretion in enforcement"). The FCC's generic definition fails both tests.

financial penalty.[19/] As this Court has consistently recognized, one of the worst vices of both overbroad and vague rules is their tendency to chill or deter constitutionally protected speech. *See, e.g.*, *Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947, 958 (1984); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Indeed, "[f]ar from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,'" *Houston* v. *Hill*, 482 U.S. 451, 467 (1987) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), the generic definition, combined with the 24-hour broadcast ban, will deprive the American people of important and valuable speech not available in any other medium of expression.

[19/] *See* 47 U.S.C. § 503(b)(1)(D), (2)(A) (penalties of up to $25,000 per violation of 18 U.S.C. § 1464); *id.* § 312(a)(6) (revocation of a station license for violation of section 1464). These are not merely hypothetical concerns, as the Comments of Pacifica, at 13-20 and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, show with regard to such literary classics as *Ulysses*, *The Grapes of Wrath*, and *Howl*. *See* n.5, *supra*.

CONCLUSION

For the reasons stated herein, the petitions for writs of certiorari should be denied.

Dated: New York, New York
January 31, 1992

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Nos. 91-883 & 91-952

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IN THE

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OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. and
AMERICAN FAMILY ASSOCIATION, INC.,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the government can, consistently with the First Amendment and with this Court's decisions in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), completely ban material that is deemed indecent—but not obscene—from radio and television.

2. Whether the "Helms Amendment," Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988), is constitutional under the First Amendment.

PARTIES TO THE PROCEEDINGS

The respondents on this brief are Action For Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; CBS, Inc.; Infinity Broadcasting Corporation; Capital Cities/ABC, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; National Public Radio; People For The American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Pursuant to this Court's Rule 29.1, following are the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of these respondents that are corporations:

Respondent Capital Cities/ABC, Inc. is affiliated with In-Store Advertising, Inc. and with Cellular Communications, Inc. Berkshire Hathaway, Inc. owns a minority of the stock of Capital Cities/ABC, Inc.

Loew's Corporation owns a minority of the stock of respondent, CBS, Inc.

Respondent National Broadcasting Company, Inc. ("NBC") is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. A wholly-owned subsidiary of NBC, NBC Cable Holding, Inc., owns a number of wholly-owned subsidiaries each of which has an interest in a number of cable-related companies, with the remaining interest in such companies being owned by unrelated companies. A wholly-owned subsidiary of NBC, NBC News Overseas, Inc., has a 37.5% interest in Visnews, Limited, with the other 62.5% interest being held by Reuters Limited and British Broadcasting Corporation. NBC has an 81.25% interest in Mobile Image Limited, a U.K. Company.

Respondent Post-Newsweek Stations, Inc. is a wholly-owned subsidiary of the Washington Post Company. The Washington Post Company has the following affiliates: Bear Island Paper Co.; Bowater Mersey Paper Co. Ltd.; International Herald Tribune, S.A.; Los Angeles Times/Washington Post News Service; Bear Island Timberlands Co.; Cowles Media Co.; Tayside Cable Systems Limited; Kingdom Cablevision Limited; and American PSC L.P.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
STATEMENT	1
REASONS FOR DENYING THE WRIT	12
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988)	6, 14
American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981)	14
American Booksellers Ass'n v. Webb, 643 F. Supp. 1546 (N.D. Ga. 1986) *reversed on other grounds*, 919 F.2d 1493 (11th Cir. 1991)	14
Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991)	16
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	14, 15, 16
Boos v. Barry, 485 U.S. 312 (1988)	16
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) (per curiam)	19
Butler v. Michigan, 352 U.S. 380 (1957)	14, 15
Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988)	14
Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982)	14
Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985)	14, 17
Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 896 F.2d 780 (3d Cir. 1990)	17
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	*passim*
Frisby v. Schultz, 487 U.S. 474 (1988)	16
Ginsberg v. New York, 390 U.S. 629 (1968)	17, 18
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	19
Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982)	14
Laird v. Tatum, 409 U.S. 824 (1972)	19
Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *reversed*, 438 U.S. 726 (1978)	17
Robinson v. FCC, 334 F.2d 534 (D.C. Cir.) (per curiam), *cert. denied*, 379 U.S. 843 (1964)	2
Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983)	14

TABLE OF AUTHORITIES—Continued

Page

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 8, 12, 13, 14, 15
Schneider v. State, 308 U.S. 147 (1939) 16
Spence v. Washington, 418 U.S. 405 (1974) (per curiam) 16
Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985) (en banc) 14
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 16
Wilkinson v. Jones, 480 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) 14

Administrative Orders

Decency in Broadcasting, Inc., 94 F.C.C. 2d 1162 (1983) 3
In re Infinity Broadcasting Corp. of Pennsylvania, 2 F.C.C. Rcd. 2705, *reconsideration and clarification granted in part and denied in part*, 3 F.C.C. Rcd. 930 (1987) 4, 5
In re Infinity Broadcasting Corp. of Pennsylvania, 3 F.C.C. Rcd. 930 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) .. 4, 5, 6
Kansas City Television, Ltd., Order, FCC 88-274 4 F.C.C. Rcd. 7653 (Aug. 5, 1988) 4
New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees, Public Notice 87-153, 62 Rad. Reg. 2d (P&F) 1218 (1987) 3, 5
In re Pacifica Foundation, Inc., 2 F.C.C. Rcd. 2698, *reconsideration and clarification granted in part and denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930 (1987) 4, 5
In re Pacifica Foundation, 95 F.C.C. 2d 750 (1983) 3

TABLE OF AUTHORITIES—Continued

	Page
In re Regents of the University of California, 2 F.C.C. Rcd. 2703 (1987)	5
WGBH Educational Foundation, 69 F.C.C. 2d 1250 (1978)	3
Constitutional and Statutory Provisions	
U.S. Const. amend. I	*passim*
18 U.S.C. § 1464 (1988)	2, 3
28 U.S.C. § 47 (1988)	19
Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988)	2, 7
Miscellaneous	
Brief for United States in Opposition, *Dial Information Services Corp. v. Barr*, No. 91-697 (cert. denied Jan. 27, 1992)	12, 17
H.P. Warner, *Radio and Television Law* § 34a (1948)	2

IN THE

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OCTOBER TERM, 1991

Nos. 91-833 & 91-952

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ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS ACTION FOR CHILDREN'S TELEVISION, *et al.* IN OPPOSITION

STATEMENT

At issue in this case in an order of the Federal Communications Commission ("Commission" or "FCC") imposing a complete ban on broadcast material that the FCC considers to be indecent, but not obscene. This blanket ban, which reversed long-standing Commission policy, was mandated by a federal statute known as the

"Helms Amendment."[1] Included within the definition of indecency is material that may be considered offensive or sexually suggestive but is clearly not obscene because it does not appeal to the prurient interest and because it has serious literary, artistic, political, or scientific merit. The background of that statute and the earlier proceedings are summarized below.[2]

From time to time in the past the Commission has sought to restrict the broadcast of "indecent" material under 18 U.S.C. § 1464 (1988).[3] Beginning in the 1970's, the Commission began to focus its attention on programs

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[1] Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989 and for Other Purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

[2] All citations to "Pet. App." refer to the Appendix to the Petition filed by the government in No. 91-952. A copy of the two-volume Joint Appendix that was filed with the court of appeals has been lodged with the Clerk of this Court. Citations to that joint appendix are designated "J.A."

[3] That statute subjects persons who "utter[] any obscene, indecent, or profane language by means of radio communication" to a fine of not more than $10,000 or imprisonment for up to two years, or both.

Pursuant to this statute, the Commission, in the 1930's, investigated a radio station that had broadcast an NBC Blue Network presentation of Eugene O'Neill's 1920 Pulitzer Prize-winning play "Beyond The Horizon." *See* H.P. Warner, *Radio and Television Law* § 34a, at 339 (1948). Subsequently, the Commission investigated both CBS and the NBC Blue Network for transmitting suggestive Spanish songs during the Spanish Civil War. *Id.* at 337. In the 1960's, the Commission refused to renew a radio station license belonging to the late Edward G. Robinson, Jr., finding that the station had broadcast programs that contained sexual innuendo and were "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," even though they were not obscene. *Robinson v. FCC*, 334 F.2d 534, 535 (D.C. Cir.) (per curiam) (affirming on alternative ground to avoid constitutional question as to program censorship), *cert. denied*, 379 U.S. 843 (1964).

involving repeated use of what have become known as the "seven dirty words." In 1978, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court narrowly affirmed the Commission's ruling that George Carlin's "Filthy Words" monologue was indecent, and that a radio broadcast of that monologue at 2 p.m. on a Tuesday afternoon violated 18 U.S.C. § 1464. A sharply divided Court "emphasize[d] the narrowness of [its] holding." 438 U.S. at 750. Thereafter, the FCC permitted broadcasters to channel broadcasts that included so-called indecent material to a safe harbor period after 10 p.m.,[4] and for the next decade indecency regulation was limited to material involving repetitive use of the so-called "seven dirty words"—the situation involved in *Pacifica* itself.[5]

In 1987, the Commission *sua sponte* released a Public Notice, abruptly altering its regulatory course. *See New Indecency Enforcement Standards To Be Applied To All Broadcast and Amateur Radio Licensees*, 62 Rad. Reg. 2d (P&F) 1218 (1987) ("Public Notice"). In this Public Notice, the Commission substantially expanded its regulation of indecency, stating that it would no longer limit its indecency enforcement to the type of material at issue in *Pacifica*. Instead, it stated that it would consider to be "indecent" and subject to regulation any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 1219.

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[4] *See New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice 87-153, 62 Rad. Reg. 2d (P&F) 1218, 1219-20 (1987) (describing prior policy).

[5] *See In re Pacifica Foundation*, 95 F.C.C. 2d 750 (1983) (finding morning announcer's use of several of "seven dirty words" not to be indecent); *WGBH Educational Foundation*, 69 F.C.C. 2d 1250, 1251 (1978) (finding television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, profanity, and sacrilege" not to be indecent). *See also Decency in Broadcasting, Inc.*, 94 F.C.C. 2d 1162 (1983).

The Public Notice and subsequent cases suggested that enforcement under this standard would encompass a range of material, including news,[6] informational programs,[7] political advertising,[8] presentations of serious drama,[9] motion pictures,[10] dramatizations of serious works of literature,[11] satirical material,[12] and recordings by popular musicians.[13] Although the Commission noted that "consideration of context is critical in *all* indecency cases," it refused to "single [serious merit] out for greater weight or attention" in the determination of whether material is indecent, or to exempt news and public affairs

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[6] KSD-FM, Notice of Apparent Liability (October 29, 1990), J.A. 737; *In re Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930, 937 n.31 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[7] *See, e.g.*, Letter to Mr. and Mrs. Roland Orle from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 784.

[8] *See, e.g.*, Letter to Hon. John E. Bourne, Jr. from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 729.

[9] *See, e.g., In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698, *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930 (1987).

[10] *See, e.g., Kansas City Television, Ltd.*, Order, FCC 88-274, 4 F.C.C. Rcd. 7653 (Aug. 5, 1988).

[11] *See, e.g.*, Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 781.

[12] *See, e.g., In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705, *reconsideration and clarification granted in part and denied in part*, 3 F.C.C. Rcd. 930 (1987).

[13] *See, e.g.*, KLUC-FM, Notice of Apparent Liability (Oct. 26, 1989), J.A. 734. The Commission did not in each of these cases (nn. 6-13) find the particular material to be indecent, but it did make clear that these types of programs are not exempt from its indecency regulation.

programming from the broad reach of the new standard.[14] In addition, the Commission in its Public Notice stated that the ban would apply to any time of day when there was a "reasonable risk" of "children" (defined by the Commission to include children and teenagers up to the age of 17) in the audience. Public Notice at 1219.[15]

Multiple petitions for reconsideration were filed on two grounds relevant here. First, the petitions urged that the Commission's indecency standard was unconstitutionally vague. *See* Reconsideration Order, Pet. App. 46a. Second, because some children and teenagers might always be in the overall audience, the petitions urged that the Commission's approach had effectively banned at all hours broadcasts that the Commission considered to be indecent, and that the Commission was obligated to adopt a safe harbor when adults could have the opportunity to see and hear such materials. *Id.*

In its December 29, 1987, Order on Reconsideration, the Commission rejected the vagueness challenge, but agreed that it was constitutionally prohibited from imposing a blanket ban and that it was obligated to create a safe harbor. *See* Reconsideration Order, Pet. App. 39a.[16] It stated that 12:00 midnight was its "current

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[14] *In re Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 932, 937 & n.28 (1987) (emphasis in original).

[15] On the same day it issued the Public Notice, the Commission released three decisions, each of which declared "indecent" material that would not have been so identified under the Commission's earlier standard; two of the three broadcasts at issue in the decisions occurred after 10 p.m. No sanctions were issued in these matters because of the acknowledged change in Commission policy. *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705 (1987); *In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698 (1987); *In re Regents of the University of California*, 2 F.C.C. Rcd. 2703 (1987).

[16] Some petitions, including one filed by Morality in Media, had urged that the Commission explicitly impose a blanket ban. The

thinking" as to when the risk of children and teenagers in the broadcast audience could reasonably be thought minimized, explaining that it "is late enough . . . to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." *Id.* at 62a-63a n.47. The Commission made clear that the safe harbor was designed to "advanc[e] the government interest in safeguarding children from [indecent material] so as to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 48a. The Commission further stated that, to be "consistent with . . . constitutional principles," it could not "preclude access by adults [to indecent materials]." *Id.* at 49a-50a.

On review, the District of Columbia Circuit (Judges Robinson, R.B. Ginsburg, and Sentelle) affirmed in part and reversed in part. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*) (Pet. App. 13a-38a). The court of appeals conceded that "vagueness is inherent" in the Commission's definition of indecency (Pet. App. 38a), but held that it was precluded from ruling that the standard is unconstitutionally vague under this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

However, the court of appeals agreed with respondents that it was necessary for the FCC to adopt "a reasonable safe harbor rule" to permit "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences." Pet. App. 35a-36a n.18. Citing the statements of the FCC's General Counsel at oral argument, the court reasoned that "the government's role is to facilitate parental supervision of children's listening," and "[t]hus, the FCC must endeavor to determine what channeling rule will

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FCC rejected this request on the ground that it would "run afoul of [the] constitutional premise. . . ." Reconsideration Order, 3 F.C.C. Rcd. at 931, Pet. App. 50a.

most effectively promote parental—as distinguished from government—control." *Id.* at 37a. The court agreed that the Commission's new safe harbor period of midnight to 6 a.m. was both arbitrary and too limited. The court concluded that the Commission's findings in this respect were "more ritual than real" and the underlying evidence on which it relied "insubstantial." *Id.* at 32a. The court therefore remanded the case to the Commission, directing it to conduct a "full and fair hearing" on the safe harbor hours.[17] *Id.* at 38a.

Before the Commission had an opportunity to conduct the hearing, Congress adopted a rider to appropriations legislation, known as "the Helms Amendment," which required the FCC to promulgate regulations imposing a 24-hour-a-day ban on indecent speech.[18] Thereafter, the Commission declined to comply with the notice and comment required by the District of Columbia Circuit's remand order, stating that to do so would be futile because its "task in promulgating the rule is purely ministerial and leaves no room for discretion." Pet. App. 78a. Accordingly, the Commission adopted a new rule banning all broadcasts of any material deemed to be indecent, no matter the time of day. *Id.* at 77a.

Respondents sought a stay on the ground that the new statute and revised policy were unconstitutional, and a panel of the District of Columbia Circuit (Judges Mikva, R.B. Ginsburg, and Silberman) unanimously stayed the

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[17] The court also directed the Commission to address the inclusion of teens aged 12-17 in the definition of children and what constitutes a "reasonable risk" that children may be exposed to indecent materials.

[18] The Helms Amendment provided that:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

order. *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3. While the stay was in effect pending review, this Court held that a blanket ban on indecent telephone message services violated the First Amendment. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). There, this Court found "quite unpersuasive" the government's argument that a blanket ban was necessary because "nothing less could prevent children from gaining access to such messages." *Id.* at 128. The Court concluded that a blanket ban could not be justified even if "a few of the most enterprising and disobedient young people would manage to secure access to such messages." *Id.* at 130.

The FCC thereafter sought a remand of the record in the present case to allow it to "collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." Motion for Remand (filed Aug. 24, 1989). The District of Columbia Circuit granted the motion "in light of the Supreme Court's recent decision in *Sable Communications of California v. FCC*," and directed the FCC to "conduct a full and fair hearing on the issue of the propriety of indecent broadcasting." *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Sept. 13, 1989), J.A. 4.

Rather than hold such a hearing, the FCC announced that it would instead "compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material." *See* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, MM Docket 89-494, Notice of Inquiry, FCC 89-307 (Nov. 20, 1989), J.A. 12. The comments received by the FCC demonstrated that the Commission's indecency regulation reaches a broad range of valuable, protected speech which to a great extent is unavailable elsewhere.[19] The

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[19] *See, e.g.*, pp. 4-5 *supra*; p. 16 n.32 *infra*; Comments of the Pacifica Foundation, *et al.* (filed Feb. 20, 1990), J.A. 321-324; Com-

majority of formal comments filed with the Commission also opposed a blanket ban on broadcast indecency, on the grounds that a ban impermissibly interferes with broadcasters' programming decisions and denies adults access to broadcasts that may contain such material, thereby reducing adults to seeing and hearing only what is fit for children.[20] In addition, these comments pointed to the absence of any showing of harm to children and presented uncontroverted evidence that parents or other adults are in fact present with virtually all children for large periods of the day, including the evening hours that the FCC itself had previously sanctioned as a safe harbor, making channeling a less restrictive means of furthering the government's interest in assisting parents to supervise their children.[21] Even comments favoring government regulation of indecent speech questioned the constitutionality of a blanket ban.[22]

The Commission also received comments in support of the blanket ban, which claimed that the government has a compelling interest in shielding both children and adults from indecency,[23] that children have broad access to televisions and radios,[24] and that it is impractical for "already harried parents" to supervise their children's

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ments of P.E.N. American Center, *et al.* (filed Feb. 20, 1990), J.A. 388-392; Comments of Cohn and Marks at 16-20 (filed Feb. 21, 1990).

[20] *See, e.g.*, Comments of Action for Children's Television, *et al.* ("ACT") (filed Feb. 20, 1990), J.A. 105-113, 136-141.

[21] *See* Comments of ACT, J.A. 114-119.

[22] *See* Comments of the U.S. Catholic Conference (filed Feb. 20, 1990), J.A. 401.

[23] *See* Reply Comments of Morality in Media, Inc. (filed Jan. 18, 1990), J.A. 459-474.

[24] *See* Comments of American Family Association, Inc., *et al.* at 15-18 (filed Feb. 21, 1990).

listening and viewing.[25] These commenters presented no evidence contradicting respondents' showing that parents or other adults were with their children for large portions of the day, and thus able to exercise control over their children's viewing and listening if they wished to do so.

On August 6, 1990, the Commission issued its Report in support of its prior conclusion that a complete ban on broadcast indecency was justified. Pet. App. 82a-151a. The Report claimed that the government has an independent interest in shielding children and teenagers from broadcast material the Commission considers indecent, regardless of whether parents have the opportunity to supervise their children. *Id.* at 94a-96a & n.22; 121a-122a. The Report also asserted that a complete ban on broadcast indecency "is the most narrowly tailored means of protecting children from indecent material" (*id.* at 147a), because "at all times there is a reasonable risk that significant numbers of children are in the broadcast audience" who are without "effective" or "meaningful parental supervision." *Id.* at 132a-134a. The Report did not take issue with respondents' showing as to the opportunities for adult supervision. To the Commission, "parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times." *Id.* at 126a.

As an apparent afterthought, the Report claimed that while the Commission had focused on protecting children, "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a. The Report referred to this basis in passing in just six of its 96 paragraphs (*id.* at 93a, 94a, 100a, 102a, 109a, 144a), and did not rely on it in concluding that a blanket ban was appropriate. *Id.* at 147a.

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[25] *Id.* at 42.

On review, the District of Columbia Circuit (Chief Judge Mikva, Judge Edwards and then-Judge Thomas) held that the blanket ban could not withstand constitutional scrutiny. The court restated the standards previously set forth in *ACT I*: indecent—but not obscene—broadcast material is protected by the First Amendment; any restrictions on such material must serve a compelling state interest and must be precisely drawn; and the government's compelling interest in "safeguarding the physical and psychological well-being of a minor . . . may be served only by a carefully-tailored regulation." Pet. App. 9a. To the court, nothing in the nearly three years since *ACT I* was decided had altered its "precedential force." Pet. App. 10a. Accordingly, the court of appeals again held that it was constitutionally necessary for the FCC to adopt some period of the day to serve as a safe harbor.[26]

The court of appeals remanded the case to the FCC for a full and fair hearing that would address a less-than-wholesale ban on broadcast indecency. The government and Children's Legal Foundation and American Family Association, Inc. sought rehearing, which was denied.[27] Pet. App. 192a. Their Suggestions for Rehearing *En*

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[26] In response to the challenge to the Commission's definition of indecency, the court of appeals stated that it was precluded by *ACT I* from finding the definition to be unconstitutionally vague. Pet. App. 7a. The court in *ACT I* had believed itself constrained from finding that definition of indecency to be unconstitutionally vague based on this Court's holding in *Pacifica*. *Id.* at 26a. *See supra* at p. 6.

The court also directed the Commission to review carefully and address "the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." Pet. App. 12a.

[27] Petitioners Children's Legal Foundation and American Family Association, Inc. will be referred to as "CLF" and their petition cited as "CLF Pet."

Banc were also denied, and no member of the District of Columbia Circuit requested that a vote on the Suggestions be taken. Pet. App. 193a. The Commission did not hold a hearing. The petitions for certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners have shown no basis for granting certiorari in this case. The conclusion reflected in the decision below—that a blanket ban on broadcast indecency is unconstitutional—was endorsed by three separate panels of the court of appeals, consisting of seven individual judges.[28] There was not a single dissent, and no judge of the court of appeals voted for rehearing en banc when the government urged the same arguments that it now presents to this Court. Pet. App. 192a-193a. Petitioners do not allege a conflict among the circuits, and, because the court of appeals remanded the matter to the FCC for further factfinding, the case lacks finality. Most significant, the decision below, far from departing from this Court's decisions, faithfully implements them, including particularly this Court's decisions in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Certiorari should be denied.

1. The government concedes that indecent—but not obscene—speech is protected by the First Amendment.[29]

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[28] The stay panel evidently agreed with the two merits panels that the regulation and the statute on which it is based were unconstitutional. *See Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3.

[29] In fact, in a separate indecency case involving telephone message services, the government, in successfully opposing a petition for certiorari, acknowledged that due to its protected status indecent speech may be regulated only if there is a compelling state interest. Brief for United States in Opposition at 8, *Dial Information Services Corp. v. Barr*, No. 91-697 (cert. denied Jan. 27, 1992) ("Dial Br."). The government there claimed only that "protecting the physical and psychological well-being of minors" is such an inter-

This well-established principle was recently reaffirmed in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), where this Court specifically held that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126. Despite this central concession, the government, along with petitioners Children's Legal Foundation and American Family Association, Inc., claim a grant of certiorari is warranted because the court of appeals did not give proper weight to the governmental "interest in protecting the adult listener from intrusion in . . . the privacy of the home." Gov't Pet. 13. *See also* CLF Pet. 24-26.

The petition for certiorari represents a complete reversal of the Commission's prior position on this issue. Less than five years ago, the Commission refused to impose a blanket ban on the broadcast of indecent material. To the Commission, a complete prohibition would "run afoul of [the] constitutional premise" that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material." Reconsideration Order, Pet. App. 49a-50a (quoted in *ACT II*, Pet. App. 11a).

The government has established no basis for granting certiorari to consider whether it may impose a blanket

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est, *id.*, and did not assert any sort of interest in "protecting" adults.

Neither *Pacifica* nor any other decision of this Court supports the suggestion of CLF (CLF Pet. 10-12) that indecent speech can be entirely excluded from the airwaves as a nuisance unprotected by the First Amendment. Indeed, the opinions in *Pacifica* said just the opposite. *See, e.g., Pacifica*, 438 U.S. at 750 (plurality opinion) (decision to regulate the Carlin monologue was based on "context," including the time of day at which it was broadcast); *id.* at 763 (Brennan, J., dissenting) (observing that "all members of the Court agree that the Carlin monologue aired by station WBAI does not fall within one of the categories of speech, such as 'fighting words,' . . . or obscenity, . . . that is totally without First Amendment protection") (citations omitted).

ban on so-called "indecent broadcasts" in order to protect adults from such material. In this respect, the decision below is not alleged to conflict with any decisions of the other courts of appeals. Indeed, every court that has considered the question has unhesitatingly agreed that blanket bans on speech, whether involving print, cable, telephone, or broadcast, violate the First Amendment.[30] Nor is there any conflict with this Court's precedents. This Court has firmly established that the government cannot "reduce the adult population" to seeing or hearing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

This continues to be the controlling principle. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court rejected the government's argument that a blanket ban on unsolicited mailings of contraceptive advertisements was constitutional because it was designed to protect the privacy of the home. While individuals may wish to restrict what enters their home, the Court stated, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72.

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[30] *See, e.g., Sable*, 492 U.S. at 127 (telephone); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (mail); *Butler v. Michigan*, 352 U.S. 380 (1957) (print); *ACT I*, 852 F.2d at 1343 n.18 (broadcasting); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) (telephone); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), *rev'd on other grounds*, 919 F.2d 1493 (11th Cir. 1991) (print); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983) (print); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

This rule is equally applicable to broadcasting. In upholding a Commission order premised on the presence of children in the listening audience, the Court in *Pacifica* rejected the notion that an interest in protecting adults from indecency would justify a blanket ban in the broadcast medium. The Court made clear that the restrictions at issue there did "not by any means reduce adults to hearing only what is fit for children." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. at 383). Justice Powell re-emphasized this point in his decisive concurrence, stating that the Commission does not have "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." 438 U.S. at 759-60.[31]

The Court recently reaffirmed this principle. In *Sable Communications*, the Court held unconstitutional a blanket ban on indecent speech involving telephone message services. Unlike the channeling in *Pacifica*, the Court stated, the ban in *Sable* was a "denial of adult access" and therefore unconstitutional, because it restricted adults to seeing and listening to "only what is fit for children". 492 U.S. at 128, 131 (internal quotations omitted). In acknowledging that broadcasting's " 'unique' attributes" may warrant limited restrictions on indecent speech that would be impermissible for other media, *Sable*, 492 U.S. at 127-128, the Court made no suggestion that a blanket ban in broadcasting would be constitutionally acceptable. To the contrary, the Court reemphasized the "narrowness" of its

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[31] While *Pacifica* itself made clear that a blanket ban designed to protect adult listeners would be unconstitutional, later decisions of this Court emphasize that an adult privacy interest would not even support channeling regulations. In *Bolger v. Youngs Drug Products, Corp.*, the Court expressly rejected protection of adults as a sufficient governmental interest, stating that such an interest "carries little weight." 463 U.S. at 71. Continuing, the Court emphasized that it was "the government's interest in protecting the young" that justified the restriction at issue in *Pacifica*. *Id.* at 74.

holding in *Pacifica*, which permitted only channeling—but not an absolute prohibition—of indecency in broadcasting.[32] There is therefore no basis for the assertion that "protecting" adults justifies a total ban on speech that falls within the First Amendment.[33]

2. The government and CLF also claim that this Court should grant certiorari to determine whether, on the facts of this case, anything other than a blanket ban on inde-

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[32] The availability of some indecent materials in other media (Gov't Pet. 19-20) has no bearing on the permissibility of the blanket ban. *See, e.g., Bolger*, 463 U.S. at 69-70 n.18; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (per curiam); *Schneider v. State*, 308 U.S. 147, 163 (1939). Moreover, contrary to the assertions of petitioners (Gov't Pet. 19-20; CLF Pet. 28), large quantities of broadcast material—such as live radio or television talk shows, coverage of breaking news stories, live broadcasts, special news reports, public affairs programs, and many made-for-television entertainment programs—simply are not available elsewhere. Of the broadcast programs that were the subjects of sixteen Notices of Apparent Liability and Letters of Inquiry issued in 1989 and 1990 on indecency grounds, at least eleven contained material that was unavailable in any other medium. *See, e.g.*, WFBQ-FM, Notice of Apparent Liability (Oct. 29, 1990), J.A. 743; KSJO, Notice of Apparent Liability (June 26, 1990), J.A. 740; WMMQ-FM, Letter of Inquiry (June 14, 1990) J.A. 757; WVIC-FM, Letter of Inquiry (June 1, 1990), J.A. 761.

[33] Nor does the Court's decision in *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991), provide support for a blanket ban. There, the state sought to ban nude dancing under a statute prohibiting public nudity. Unlike the blanket ban on protected speech here, the statute in *Barnes* addressed conduct, and had only an incidental effect on constitutionally-protected expression. *See* 111 S.Ct. at 2461 (plurality opinion); *id.* at 2463 (Scalia, J. concurring); *id.* at 2468 (Souter, J. concurring). Moreover, the decisive vote of Justice Souter in *Barnes* turned on the adverse secondary effects of nude barroom dancing, *id.* at 2468-2469; there are no secondary effects that are claimed to support the blanket ban at issue here.

The government's reliance on *Frisby v. Schultz*, 487 U.S. 474 (1988), is similarly misplaced. The prohibition on residential picketing at issue there was a content-neutral time, place, and manner regulation. Here, in contrast, the ban is content-specific. *See Boos v. Barry*, 485 U.S. 312, 319-321 (1988).

cent broadcasts would enable parents to supervise children. Gov't Pet. 10; CLF Pet. 28. Certiorari is not appropriate simply to determine whether the court below reached the correct result on the facts of this case.[34]

In any event, that result was clearly correct. The government's sole legitimate interest in regulating indecent speech is to provide parents the opportunity to supervise their children's listening and viewing, not to supersede parental authority. "[C]onstitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (quoted with approval in *Pacifica*, 438 U.S. at 749-50). Judge Leventhal's dissenting opinion in *Pacifica* in the court of appeals concluded that the Commission could "assist parents in their protection of young children," and noted that the channeling of indecent speech "reflects . . . a determination concerning a broad consensus of society, . . . the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice." *Pacifica Foundation v. FCC*, 556 F.2d 9, 33, 37 (D.C. Cir. 1977) (Leventhal, J. dissenting) (cited with approval in *Pacifica*, 438 U.S. at 757 & n.1 (Opinion of Powell, J.)). The courts have repeatedly stressed this interest as the key in determining the permissible scope of regulation.[35]

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[34] The government recently successfully opposed a grant of certiorari in another case that raised the question of whether the court below had correctly applied accepted standards to the facts of a particular case, in the context of the most recent Helms Amendment regulating dial-it services. *See* Dial Br. at 8-9, *supra* note 29.

[35] *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (parental decisionmaking in cable); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 788 (3d Cir. 1990) (parental decisionmaking in dial-it services). Even *Ginsberg v. New York*, which involved speech that was obscene, not indecent, as to children, emphasized that laws prohibiting distribution to minors, while they "aid discharge" of parents' "primary responsi-

The uncontradicted record below establishes that parents (or other adults) are with their children for much of the broadcast day, and are available to supervise their children's viewing and listening. For example, between the hours of 10 p.m. and 6 a.m., the safe harbor period used by the Commission during the decade following *Pacifica*, 99% of all persons aged 17 and younger are under adult supervision; more than 93% are under parental supervision.[36] Similarly, in the midnight to 6 a.m. period, the safe harbor period adopted by the Commission in its December 29, 1987, decision and held to be inadequate by the court of appeals in *ACT I*, more than 98% of persons aged 17 years and younger are under parental supervision.[37]

It is thus beside the point that "minors are present in the audiences for radio and television broadcasts at all times of the day and night." Gov't Pet. 16. *See also* CLF Pet. 28. The record before the court of appeals unequivocally establishes that, because parents have the opportunity to control their children's viewing and listening during most of the day, including the evening hours, the government's interest in "promoting parental supervision of children's listening" can be served without imposing a blanket ban on protected speech. *ACT I*, Pet. App. 37a-38a. That parents may choose not to supervise their children's viewing and listening is not relevant; the governmental interest is precisely in providing parents this choice.

3. Review on this record also would not be appropriate because the judgment below lacks finality. *See, e.g.*,

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bility for children's well being," do "not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639.

[36] *See* National Research, Inc., When Children Are In The Presence Of Parents And Other Adults: A Survey of Parents (1990) J.A. 238-239.

[37] *Id.*

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (fact that decree was not final "alone furnished sufficient ground for the denial" of certiorari). The court of appeals remanded this case to the Commission for a hearing to determine the proper hours of a safe harbor period. That hearing has not been held.

If review of the blanket ban were appropriate at all, it would best be considered in the context of a fully-developed Commission record. In its absence, the Court would be unable to evaluate available alternatives to a complete ban on protected speech and the effectiveness of such alternative measures in serving the valid governmental interest.[38]

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[38] A grant of certiorari would also be undesirable because of the likelihood that Justice Thomas would be unavailable to review this case due to his participation when it was heard in the court of appeals. *Cf.* 28 U.S.C. § 47 (1988) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him"). His absence would create the possibility of a divided Court, which counsels against a grant of certiorari. As then-Justice Rehnquist recognized, "[w]hile it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court." *Laird v. Tatum*, 409 U.S. 824, 837-838 (1972) (Rehnquist, J.) (memorandum decision).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 91-952

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In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) ...	5, 6
Community Television of Utah, Inc. v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), aff'd, 800 F.2d 989 (10th Cir. 1986), aff'd mem. , 480 U.S. 926 (1987)	5
Cruz v. *Ferre*, 755 F. 2d 1415 (11th Cir. 1985)	5
Dial Information Services Corp. v. *Barr*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, No. 91-697 (Jan. 27, 1992)	5,7
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978)	1, 2, 5, 6
Ginsberg v. *New York*, 390 U.S. 629 (1968)	5
Information Providers' Coalition for Defense of the First Amendment v. *FCC*, 928 F.2d 866 (9th Cir. 1991)	7
Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989)	4, 5, 6, 7

Constitution and statutes:

U.S. Const. Amend. I	2, 4, 5, 6, 8
18 U.S.C. 1464	1, 2, 3, 4
47 U.S.C. 544 (d)(2)(A)	5

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REPLY BRIEF FOR THE PETITIONERS

In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that the FCC could constitutionally apply the longstanding statutory prohibition on indecent broadcasting, 18 U.S.C. 1464, to a daytime broadcast of patently offensive, albeit non-obscene, material. In reaching that conclusion, the Court identified two compelling interests that support restrictions on indecent broadcasting. First, because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone

plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. "The ease with which children may obtain access to broadcast material," coupled with the "government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household,' " "amply justify special treatment of indecent broadcasting." *Id.* at 749-750. See also *id.* at 756-761 (Powell, J., concurring in part and concurring in the judgment).

The fundamental question in this case is whether, in light of evidence that millions of children are present in the audiences for television and radio at all times of the day and night, those same two interests will support an Act of Congress providing for 24-hour-per-day enforcement of Section 1464. Because the court of appeals deemed itself bound by a prior decision addressing a different enforcement approach, it did not even give plenary consideration to the interests this Court recognized in *Pacifica*. Only this Court is now in a position to undertake that task. Since the court of appeals' judgment precludes any future enforcement of the congressionally mandated prohibition on indecent speech, no other lower court will have the opportunity to consider that statute's constitutionality.

The fact that the court of appeals struck down a federal statute, the importance and finality of that decision, and the absence of any meaningful attention to governing legal standards in the decision below present a compelling case for this Court's review. None of the objections that respondents advance suggests otherwise.

1. Contrary to respondents' contention,[1] the court of appeals' decision is plainly ripe for this Court's review. Although the court remanded to the Commission for further proceedings, the court's mandate precludes any further consideration of the merits of Congress's 24-hour prohibition on indecent speech. The remand is limited to the issue of "the times at which indecent material may be broadcast" and other matters bearing on that issue. Pet. App. 12a; see *id.* at 32a-38a.

Furthermore, the FCC has completed a comprehensive study of the justifications for 24-hour enforcement of Section 1464. Pet. App. 82a-191a. Contrary to respondents' suggestion (ACT Opp. 19), the Commission has already assembled "a fully-developed * * * record" that addresses "available alternatives to a complete ban on protected speech and the effectiveness of such alternative measures in serving the valid governmental interest." The limited proceedings contemplated by the court of appeals' remand would contribute nothing to this Court's consideration of the question presented by the petition.

2. Respondents' defense of the merits of the court of appeals' decision has two principal themes. The invalidity of both underscores the absence of any justification for the court of appeals' decision and the need for this Court's review.[2]

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[1] Brief for the Respondents Action for Children's Television, *et al.*, in Opposition 12, 18-19 [hereinafter ACT Opp.]; Brief for the Respondents Pacifica Foundation, Pen American Center, Allen Ginsberg, *et al.*, in Opposition to Petitions for Writs of Certiorari 15 n.10 [hereinafter Pacifica Opp.].

[2] In their zeal to discredit the FCC's approach to indecent broadcasting, respondents leave the impression that the Commission has enforced Section 1464 against "news, informational programs, political advertising, presentations of serious drama, motion pictures, dramatizations of serious works of literature, satirical material, and recordings by popular musicians." ACT Opp.

a. First, respondents attempt to rework decisions involving a variety of media into a general principle that "blanket bans on speech, whether involving print, cable, telephone, or broadcast, violate the First Amendment." ACT Opp. 14 & n.30. In the same vein, they suggest that this Court's oft-repeated observation that measures intended for the protection of minors may "not by any means reduce adults to hearing only what is fit for children" means that space must be reserved for indecent speech in each particular medium. *Id.* at 14-16; see Pacifica Opp. 20, 21-22. The cases support neither proposition.

The decision in the instant case is the first to consider a 24-hour prohibition on indecent *broadcasting*. Other media do not share the " 'unique' attributes of broadcasting"[3] that were decisive in *Pacifica*, and cases addressing those media have repeatedly recognized that fact. With respect to the print medium, unwilling adults may simply avoid indecent published materials,

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4 & nn.6-13; see Pacifica Opp. 9 & n.5, 19. The grudging acknowledgment that the Commission *declined to take action* in all but a few of those cases is buried in a footnote. ACT Opp. 4 n.13. Moreover, respondents' carefully sanitized characterizations of the material in question provide no basis for a fair evaluation of the FCC's enforcement record. This case is not about news, informational programs, and the like; the materials that actually gave rise to the current controversy can be found in the appendix to the petition, Pet. App. 66a-69a. The record reflects that the FCC does not regard the mere presence of a sexually explicit reference in a serious presentation of a literary work or a bona fide news program as a basis for a violation of Section 1464. The material must be patently offensive. Finally, since none of the respondents filed a cross-petition seeking further review of the Commission's generic definition of indecency, their complaints concerning the scope of that definition are not properly before the Court.

[3] *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989).

and the State has the option of banning sales to minors.[4] Federal law requires cable television operators to honor requests from subscribers for lockboxes that restrict access to indecent programming, and subscribers may choose not to purchase channels providing that type of material.[5] As this Court noted in *Sable*, 492 U.S. at 127, 128, "private commercial telephone communications * * * are substantially different from the public radio broadcast at issue in *Pacifica*," since "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[6] Likewise, in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), this Court noted that the "receipt of mail is far less intrusive and uncontrollable" than broadcasting.

Similarly, no decision of this Court recognizes a general rule that space must be reserved in each medium for indecent speech. In *Pacifica*, the Court had no occasion to consider the constitutionality of a 24-hour ban. In fact, *Pacifica* made clear that courts are not

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[4] See *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

[5] 47 U.S.C. 544(d)(2)(A). See *Cruz* v. *Ferre*, 755 F.2d 1415, 1420-1421 (11th Cir. 1985) (distinguishing *Pacifica* on this basis); *Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099, 1109-1110 (D. Utah 1985) ("fundamental differences between the broadcast medium and cable television require that *Pacifica* not be extended to cable television"), aff'd, 800 F.2d 989 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987).

[6] It is for that reason that we did not rely on the interest in protecting the privacy of the home when we opposed certiorari in *Dial Information Services Corp.* v. *Barr*, cert. denied, No. 91-697 (Jan. 27, 1992). There is no merit whatever to respondents' suggestion (ACT Opp. 12 n.29) that we acknowledged the correctness of their approach in this case in our brief in opposition in *Dial Information*. Both *Pacifica*, 438 U.S. at 748-749, and *Sable*, 492 U.S. at 127, noted that the " 'unique' attributes of broadcasting" warrant a different First Amendment analysis in the context of that medium.

required to analyze the validity of restrictions on indecent broadcasting as though that medium were the only source of indecent material.[7] Other decisions on which respondents rely have carefully reserved the question whether their reasoning would reach broadcasting. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 74; *Sable*, 492 U.S. at 127-128.

The governing principle that can be gleaned from all of these cases is that the First Amendment must be applied with careful attention to both the interests supporting limitations on indecent speech and the characteristics of the particular medium in question. As we demonstrated in the petition, the court of appeals failed to honor that principle in this case.

b. Respondents acknowledge, as they must, that indecent broadcasting may be restricted in order to serve "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'" (*Pacifica*, 438 U.S. at 749). But they advocate a cramped and artificial conception of that interest. In their view, government's legitimate interest in the Nation's youth is limited to "provid[ing] parents the opportunity to supervise their children's listening and viewing," and it is fully vindicated when

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[7] The Court stated (438 U.S. at 750 n.28):

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. * * * Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

At a minimum, this passage makes clear that the availability of indecent material to willing adults need not be approached on a medium-by-medium basis.

parents "are *available* to supervise their children's viewing and listening." ACT Opp. 17, 18 (emphasis added); see Pacifica Opp. 22-23.

That view of the law cannot be reconciled with *Sable*. Parents have at least the same opportunity to supervise their children's access to indecent commercial telephone messages as to indecent broadcasting. (In truth, portable radios and earphones, VCRs, and the absence of billed charges for broadcasting make it far more difficult for even the most diligent parent to limit a child's access to indecent broadcasting.) Yet *Sable* establishes that the mere opportunity to exert close supervision over children's use of telephones does not exhaust the compelling interest in protecting children from indecent speech. The Court's decision in that case was contingent upon the existence of a more effective technological means of denying access (492 U.S. at 130-131 (emphasis added)):

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. *If this is the case*, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

In later cases in the lower courts, the FCC's technological approach has been upheld; there has been no claim that parental presence alone is a sufficient means of protecting children from indecent material.[8]

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[8] *Dial Information Services Corp.* v. *Barr*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, No. 91-967 (Jan. 27, 1992); *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (9th Cir. 1991).

As the FCC explained in detail (Pet. App. 131à-140a), no comparable technology is available to deny children access to indecent material broadcast over the public airwaves. The record establishes that more than "a few of the most enterprising and disobedient young people" can and do turn on their radios and televisions around the clock. Pet. App. 129a. The First Amendment does not require Congress or the courts to ignore those realities. The mere presence of an adult in a home is not the equivalent of effective control over the access of children to indecent broadcasting, and nothing in this Court's cases suggests otherwise.

Indecent broadcasting cannot be targeted exclusively at adults who wish to receive it. Consequently, before it struck down the statute at issue here, the court of appeals should have considered whether the compelling interests in the privacy of the home and the protection of children must be subordinated to the interests asserted by respondents in broadcasting indecent speech over the public airwaves into every home with a television or a radio. The court failed to do so. That question is ripe for further review, and worthy of this Court's attention.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1992

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* The Solicitor General is disqualified in this case.